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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

v.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Pertinent Statutes	3
Questions Presented	3
Statement of the Case	6
Reasons for Granting the Writ	13
IA. The Supreme Court of the United States Has the Inherent Power to Supervise the Administration of Justice in the Lower Courts, Particularly Where, as Here, the Decision Below Denies to Petitioner Due Process of Law, Thus Sanctioning a Radical Departure from the Accepted and Usual Course of Judicial Proceedings	13
IB. Basic Tenets of Fairness Require That the Court of Appeals Should Not Consider Issues Involving Questions of Fact Not Resolved by the District Court	15
II. The Decision Below Is in Conflict With a Decision in the Third Circuit, and a Hearing in This Court Will Secure Uniformity of Decision on the Requirements of Standing Within the Context of a Denial of Due Process of Law	19
Conclusion	25

TABLE OF AUTHORITIES CITED

Cases

Pages

Association of Data Processing Service Organization v. Camp (1970) 397 U.S. 150, 25 L.Ed.2d 184..... 12

Barlow v. Collins (1970) 397 U.S. 159, 25 L.Ed.2d 192 12
Bratcher v. Akron Board of Realtors, (C.A. 7) 381 F.2d 723 (1967) 12
British Airways Board v. Port Authority of New York (C.A. 2) 558 F.2d 75 (1977).....14, 15, 16, 21
Buckaloo v. Johnson (1975) 14 C.3d 815..... 9

California Diversified Services Inc. v. Musick (C.A. 9) 505 F.2d 278 (1974)..... 6, 14
California Motor Transport v. Trucking Unlimited (1972) 404 U.S. 508, 30 L.Ed.2d 642.....10 (Fn 5)
Carter v. Stanton (1972) 405 U.S. 669, 31 L.Ed.2d 569 .....16, 19
City of Davis v. Coleman (C.A. 9) 521 F.2d 661 (1975) 12, 24
City of Hartford v. Towns of Glastonbury (C.A. 2) 561 F.2d 1032 (1976)..... 17
City of Lafayette, La. v. Louisiana Light & Power Co. (1978) 435 U.S. 389, 55 L.Ed.2d 364..... 12
City of Rohnert Park v. Patricia Roberts Harris, etc., et al. (C.A. 9) 601 F.2d 1040 (1979)..... 2
City of Seattle v. Stirrat (1909) 55 Wash. 560, 104 Pac. 835 9
Cort v. Ash (1975) 422 U.S. 66, 45 L.Ed.2d 26.....19 (Fn 10)

Denton v. Mr. Swiss of Missouri, Inc. (C.A. 8) 564 F.2d 236 (1977) 14
Duke Power Company v. Carolina Study Group (1978) 438 U.S. 59, 57 L.Ed.2d 595.....22, 23
Duskin v. San Francisco Redevelopment Agency (1973) 31 C.A.3d 769 .....6 (Fn 2)

Pages

Foeller v. Housing Authority of Portland (1953) 198 Ore. 205, 256 P.2d 752.....6 (Fn. 2)
Fountain v. Filson (1949) 336 U.S. 681, 93 L.Ed. 971.... 17

Grammercy Spire Tenants' Assn. v. Harris (D.C. N.Y.) 446 F.Supp. 814 (1977) .....12 (Fn. 6)
Griffin v. County School Board of Prince Edward County, Va. (C.A. 4) 363 F.2d 206 (1966) cert.den. 385 U.S. 960 .....9 (Fn 4)

Hawaii v. Standard Oil of California (1972) 405 U.S. 251, 31 L.Ed.2d 184..... 20
Hecht v. Pro-Football, Inc. (C.A. D.C.) 444 F.2d 931 (1971), cert.den. 404 U.S. 1047, 30 L.Ed.2d 736..... 12
Heirs of Fruge v. Blood Services (C.A. 5) 506 F.2d 841 (1975) 17
Hormel v. Helvering (1941) 312 U.S. 552, 85 L.Ed. 1037 13–14
Hospital Building Co. v. Rex Hospital Trustees (1976) 425 U.S. 738, 48 L.Ed.2d 338..... 12

Jones v. Securities and Exchange Commission (1936) 298 U.S. 1, 80 L.Ed. 1015.....9 (Fn 4)

Mid-West Paper Products v. Continental Group Inc. (C.A. 3) 596 F.2d 573 (1979).....6, 11–12, 19, 20, 24, 25

O'Shea v. Littleton (1974) 414 U.S. 488, 38 L.Ed.2d 674 21

People of Saipan v. United States Department of Interior (C.A. 9) 502 F.2d 90 (1974), cert.den. 420 U.S. 1003 .....9 (Fn 4)

Pages

Sierra Club v. Morton (1972) 405 U.S. 727, 31 L.Ed.2d 636 12

Singleton v. Wulff (1976) 428 U.S. 106, 49 L.Ed.2d 826 ..... 13, 14, 19

State of California v. Automobile Manufacturers Assn. (C.A. 9) 481 F.2d 122 (1973) cert.den. 414 U.S. 1045, 38 L.Ed.2d 336 (1973) 11

State of Washington v. Automobile Manufacturers Assn. (C.A. 9) 538 F.2d 231 (1976) 11

Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc. (D.C. Wisc.) ..... F. Supp. ..... (1979) summarized at No. 939, ATTR of Nov. 15, 1979, at PP. A-16 to A-17 ..... 10 (Fn 5)

United States v. Aluminum Company of America (C.A. 2) 148 F.2d 416 (1945) 8

Village of Arlington Heights v. Metropolitan Housing Development Corporation et al. (1977) 429 U.S. 252, 50 L.Ed.2d 450 ..... 21, 22

Warth v. Seldin (1975) 422 U.S. 490, 45 L.Ed.2d 343 ..... 6, 14, 19, 21, 22

Zenith Radio Corp. v. Hazeltine Research, Inc. (1969) 395 U.S. 100, 23 L.Ed.2d 129 ..... 11, 12, 20

STATUTES

Administrative Procedure Act:

5 U.S.C. 551 et seq. 3, 19

5 U.S.C. 701 et seq. 3

5 U.S.C. 702 ..... 3, 5, 7, 15

Section 10 (5 U.S.C. 702) 7, 11

Pages

5 U.S.C. 706 ..... 3, 5

5 U.S.C. 706(2) ..... 16 (Fn 9), 23

Section 14 (5 U.S.C. 706) 7, 11

Clayton Act, 15 U.S.C. 12 et seq. 3

15 U.S.C. 26 ..... 3, 4, 23

Clayton Act:

Section 4 (5 U.S.C. 26) 20

Section 16 (5 U.S.C. 26) 3, 5, 7, 11, 20, 24

National Housing Act of 1949, as amended:

42 U.S.C. 1441 et seq. 3, 6, 7, 15, 16

42 U.S.C. 1460 8

42 U.S.C. 1460(c)(4) ..... 3, 5, 6, 7, 15, 19 (Fn 10)

Sherman Act, 15 U.S.C. 1 et seq. ..... 3, 10 (Fn 5)

15 U.S.C. 1 ..... 5, 7, 8

15 U.S.C. 2 ..... 3, 5, 7, 8, 22

Price-Anderson Act 22

28 U.S.C. 1331 7

28 U.S.C. 1337 7

28 U.S.C. 2201 7

42 U.S.C. 3532(b) ..... 12 (Fn. 6)

RULES OF COURT

Federal Rules of Civil Procedure:

Rule 56 ..... 4, 5

Rule 56(c) 4, 18, 21

Rule 60(b) ..... 14 (Fn 7)

CODES

	Pages
California Government Code:	
Section 65300	11
Section 65302	11
California Health & Safety Code:	
Section 33433	6 (Fn 2)

CONSTITUTIONS

U. S. Constitution:	
Article III	16, 19, 22
Article III, Section 1	13
Fifth Amendment	13

TEXT

Federal Practice and Procedure, Volume 13 (Wright-Miller-Cooper), 1978 Pocket Supplement, Section 3531, page 54	21

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TO the HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner CITY OF ROHNERT PARK, a municipal corporation, respectfully prays that a writ of certiorari issue to

review the Opinion and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 24, 1979 (App. p. 220), and corrected by Order of October 26, 1979 (App. pp. 307-8), the same having followed the entry of judgment (App. p. 189) by the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals of July 24, 1979, reported, at 601 F.2d 1040, appears in the Appendix hereto *sub nom City of Rohnert Park v. Patricia Roberts Harris, et al.* (App. p. 220), together with the opinion and judgment of the United States District Court for the Northern District of California (App. pp. 183-189) *sub nom City of Rohnert Park v. James T. Lynn, et al.* An earlier opinion and judgment of the Court of Appeals filed on May 9, 1979 (hereinafter *first* opinion), later "withdrawn," appears in the Appendix (App. p. 192).

JURISDICTION

The *first* opinion and order of the Court of Appeals was entered in this proceeding on May 9, 1979, after a timely Notice of Appeal from a judgment of the United States District Court (App. p.189) was filed on December 15, 1976. A timely petition for rehearing and suggestion of hearing in banc was denied on July 24, 1979, and its *first* opinion was "withdrawn" by the Court of Appeals (App. p. 224). The *second* opinion and order in this proceeding was entered on July 24, 1979 (App. p. 220), and a timely petition for rehearing and suggestion of hearing in banc was filed on August 6, 1979 (App. pp. 241-253) and denied on October 26, 1979 (App. p. 254). The Court of Appeals also issued an order correcting the *second* opinion on the same date (App. p. 307).

PERTINENT STATUTES

1. Sherman Act, 15 U.S.C. 1 et seq., and more particularly Sections 1 and 2;
2. Clayton Act, 15 U.S.C. 12 et seq., and more particularly Section 26;
3. Administrative Procedure Act, 5 U.S.C. 551 et seq. and 5 U.S.C. 701 et seq., and more particularly Sections 702 and 706;
4. National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq., and more particularly 5 U.S.C. 1460(c)(4).

Copies of these appear in the Appendix at p. 341 through p. 346.

QUESTIONS PRESENTED

An appeal was taken by Petitioner (plaintiff in the District Court) from a separate judgment entered in the United States District Court following an Opinion of the Honorable William W. Schwarzer (App. p. 183) granting Respondents' motions for summary judgment. Notwithstanding appropriate allegations in the Complaint For Declaratory and Injunctive Relief (hereinafter Complaint) (App. pp. 1-42). Judge Schwarzer did not so much as mention Petitioner's claim for relief under the Administrative Procedure Act (5 U.S.C. 702, 706) for violation of the National Housing Act of 1949, as amended [42 U.S.C. 1441 et seq., 1460(c)(4)]. He granted summary judgment only on the claim for injunctive relief under Section 16 of the Clayton Act (15 U.S.C. 26), finding that (App. p. 187): "• • • plaintiff has made no showing from which a trier of fact could find ongoing violations of the antitrust laws. • • •." More significantly, Judge Schwarzer did not either mention or hold that Petitioner lacked standing to seek relief under Section 16, Clayton Act (15 U.S.C. 26). By its failure to deal with the issue of standing, the District Court, at least by inference, conceded that Petitioner *did* have standing.

However, the Court of Appeals, instead of reversing and remanding to allow amendment of the Complaint and presentation of further evidence on the issue of standing, remanded for dismissal for lack of standing (App. p. 239). Indeed, the Court of Appeals stated in part (App. p. 227): "We need not reach the question whether summary judgment was appropriate * * *." Accordingly, it never reached the point of determining there was "no genuine issue of any material fact" (Rule 56(c), Federal Rules of Civil Procedure).

During the proceedings before the District Court, the reality of Petitioner's injury from violation of a "relevant statute" was not questioned by the District Court nor by Respondents. In this connection, it should be noted that the allegations of the Complaint regarding this injury (App. pp. 8, 13-14) were not "pierced" by any evidence submitted by Respondents and admissible under Rule 56, Federal Rules of Civil Procedure. Nor did the District Court even mention "threatened loss or damage" under 15 U.S.C. 26, although Petitioner alleged such loss as well as economic loss in its Complaint (App. p. 4). Notwithstanding, the Court of Appeals made impermissible findings of fact not supported by any evidence, on these and other issues. Had the reality of Petitioner's injury and these other issues, including standing, been raised by the Court or the Respondents during the proceeding before the District Court, Petitioner should have been given notice thereof, a hearing and an opportunity to produce admissible evidence demonstrating that there were genuine issues of material facts regarding the reality of its injury or that its Complaint could be amended to state a claim for relief and standing to assert it. On July 24, 1979, the Opinion and Order of the Court of Appeals stated in part: "We remand for dismissal in accordance with this opinion" (App. p. 239), holding, *inter alia,* that Petitioner lacked standing to assert any

claims for relief. The Court of Appeals did not affirm the judgment of the District Court, but treated the motions for summary judgment as motions to dismiss for failure to state any claims for relief and lack of standing to assert them, thereby introducing both confusion and ambiguity into this proceeding. Under such circumstances, Petitioner should have been given an opportunity to amend its Complaint, but was not, and it was thus denied due process of law. Even treated as affirming summary judgment, the Opinion and Order of July 24, 1979, *made impermissible findings of fact on appeal,* a plainly erroneous application of Rule 56, Federal Rules of Civil Procedure.

In the setting above outlined, the following questions are presented:

1. Whether Petitioner was denied due process of law for failure of the Court of Appeals to reverse and remand to the District Court for amendment of its Complaint, for the taking of evidence on issues as to which it made findings of fact on questions not resolved by said District Court or both?

2. Whether the Court of Appeals erred in dismissing for lack of standing an appeal from a judgment granted on motions for summary judgment.

3. Whether Petitioner has standing to seek injunctive relief under Section 16 of the Clayton Act (15 U.S.C. 26) for threatened loss or damage under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2)?

4. Whether, within the context of this proceeding, Petitioner has standing to seek relief under the Administrative Procedure Act (5 U.S.C. 702 and 706) for violation by Respondent Secretary of Housing and Urban Development of a relevant statute, namely, 42 U.S.C. 1460(c)(4) and its regulations thereunder (App. pp. 347-367)—sale of federally subsidized urban renewal land at less than its "fair value?"

5. Whether the Court of Appeals for the Ninth Circuit erred in not following the rationale of its own decision in *California Diversified Services Inc. v. Musick* and the decision in *Mid-West Paper Products v. Continental Group, Inc.* in the Third Circuit as well as failing to follow the rationale of the decision of this Court in *Warth v. Seldin,* all three cases cited infra?[1]

6. Whether a federal appellate court has the right to dismiss a complaint on appeal from a judgment entered upon motions for summary judgment where the record shows genuine issues of material facts?

STATEMENT OF THE CASE

This is a case wherein Petitioner has alleged that Respondent HUD has illegally subsidized a violation of the anti-trust law. It has done so by sanctioning a clear violation of the National Housing Act of 1949, as amended (42 U.S.C. 1441 et seq.). The sale of federally subsidized urban renewal land by the Santa Rosa Respondents at less than its "fair value"[2] to Respondent Hahn with the invalid and unlawful concurrence of Respondent HUD is a violation of 42 U.S.C. 1460(c)(4) and regulations thereunder, and

1. *California Diversified Services Inc. v. Musick* (C.A. 9) 505 F.2d 278 (1974); *Mid-West Paper Products v. Continental Group Inc.* (C.A. 3) 596 F.2d 573 (1979); and *Warth v. Seldin* (1975) 422 U.S. 490, 45 L.Ed.2d 343.

2. Four months after Respondent HUD concurred in a land disposition price of $2,000,000 for 20 acres ($100,000/acre), *Respondent Hahn agreed to sell 6.33 acres of the same land for $3,000,000 ($473,934/acre) — almost five (5) times what HUD thought was "fair value"* (App. p. 374). Cf. *Foeller v. Housing Authority of Portland* (1953) 198 Ore. 205, 256 P.2d 752, 767 ["Re-sales (by the Housing Authority) cannot offer private persons opportunities for enrichment or exploitation, for the act declares that property must be sold 'at its fair re-use value' * * *."]. See also *Duskin v. San Francisco Redevelopment Agency* (1973) 31 C.A.3d 769 [sale at "fair value" required under 42 U.S.C. 1460(c)(4) and Section 33433, California Health & Safety Code].

said violation thus illegally subsidizes the Hahn Santa Rosa regional shopping center, thereby producing a result unlawful under the Sherman Act (15 U.S.C. 1, 2). Indeed the Court of Appeals said (App. p. 239): "Assuming we were to grant the requested relief, we would have to remand to the district court for a determination of fair reuse value in accordance with the regulations." A sale at fair value would also minimize, if not eliminate the illegal subsidy to Respondent Hahn. If the Santa Rosa regional shopping center is built by Respondent Hahn upon land the cost of which was illegally subsidized, it will monopolize about 85% of the market for new retail space within the Santa Rosa Trade Area. The result of this exclusionary and predatory conduct of Respondents will be the absolute exclusion from the relevant market of Petitioner and those property owners, taxpayers and inhabitants for whom it speaks. All of them, being in the target area of the conspiracy or attempt to monopolize, will suffer injury in fact, economic, or otherwise, unless Respondents are enjoined from these ongoing violations of the antitrust laws.

On November 19, 1974, Petitioner filed its Complaint (App. pp. 1-42), alleging, *inter alia,* a violation by Respondents of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) and a violation of the National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq. and in particular, 42 U.S.C. 1460(c)(4). Petitioner sought injunctive relief under Section 16 of the Clayton Act (15 U.S.C. 26) and Sections 10 and 14 of the Administrative Procedure Act (5 U.S.C. 702, 706), praying for an order setting aside Respondent HUD's concurrence (agency action) in the price at which the urban renewal land was to be sold by the Santa Rosa Respondents to Respondent Hahn. Jurisdiction of the District Court was invoked under 28 U.S.C. 1331, 1337 and 2201, together with 5 U.S.C. 702.

The purpose of the Petitioner's suit was to enjoin the continuance by Respondents of a current ongoing con-

spiracy which has for its purpose a violation of the antitrust laws, namely, a conspiracy or attempt to monopolize approximately 85% of the new commercial retail space needs within the Santa Rosa Trade Area. The unlawful means used by Respondents involve a violation of 42 U.S.C. 1460 and, unless enjoined, will produce a result forbidden under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2). In so illegally subsidizing Respondent Hahn with actual knowledge of the monopoly to be established (App. pp. 7, 371-372), Respondent HUD has arrayed itself on the side of one competitor, Respondent Hahn, against Petitioner, a competitor, and is part of the conspiracy or attempt to monopolize amongst all Respondents to the complete exclusion of Petitioner, together with its property owners, taxpayers and inhabitants from the relevant market for new retail space in the Santa Rosa Trade Area until at least 1990 (App. pp. 371-372).[3] The Santa Rosa Respondents had actual knowledge in 1972 that the regional shopping center to be built by Respondent Hahn of about 680,000 square feet would "* * * kill off any possibility of a major development in Rohnert Park * * *." (App. p. 369) and conspired with Respondent Hahn to build "excess capacity" to insure that death occurred. See *United States v. Aluminum Company of America* (C.A.2) 148 F.2d 416 (1945)—abuse of its monopoly power by continuing construction of excess capacity to prevent the entry of others was a violation of the antitrust laws.

Petitioner, a municipal corporation, is located in Sonoma County about seven miles south of Respondent City of Santa Rosa, also a municipal corporation, and both are

3. In its Final Environmental Impact Statement (FEIS), Respondent HUD stated that the proposed regional shopping center (700,000 square feet) would absorb most of the need for new retail space in the relevant market until about 1990 (App. pp. 371-372). In actuality, Respondent Hahn's regional shopping center will be 835,000 square feet (App. p. 376), representing *excess capacity* of 19% over what HUD said would not be absorbed in the relevant market until 1990.

located within the Santa Rosa Trade Area, the relevant market, which includes all of Sonoma County and part of northern Marin County in California. The boundaries of this relevant market are not disputed. Over the period from 1966 to 1972, an amount in excess of $1,200,000 was spent by Petitioner for street construction, sewers, water mains, drainage and other improvements necessary to make a large site within Petitioner's boundaries suitable for commercial development. Most of the funds required to defray the cost of these improvements were raised by special assessments levied by Petitioner against the various property owners of the property (App. p. 4). Petitioner itself owns two parcels of property within the site to be commercially developed and is within the target area of the conspiracy or attempt to monopolize. In raising and disbursing these funds for these improvements, Petitioner was acting in its proprietary capacity using funds held as a trust for the benefit of the individual property owners so assessed. *City of Seattle v. Stirrat* (1909) 55 Wash. 560, 104 Pac. 835, 836-837.

Contrary to the notion expressed by the Court (App. p. 230), at no time did Petitioner ever complain that it was not selected by Respondent HUD or anyone else as the site for a *federally subsidized* regional shopping center. However, Respondent Hahn induced Sears Roebuck & Co. to abandon any plans it might have made to build in Rohnert Park by means which, in California, represent an actionable tort. *Buckaloo v. Johnson* (1975) 14 C.3d 815. See App. pp. 324-328 for status of the Sears department store in Santa Rosa, now almost completed.[4] Prior to

4. See *Jones v. Securities and Exchange Commission* (1936) 298 U.S. 1, 80 L.Ed. 1015; *Griffin v. County School Board of Prince Edward County, Va.* (C.A. 4) 363 F.2d 206 (1966) cert. den. 385 U.S. 960, and *People of Saipan v. United States Department of Interior* (C.A. 9) 502 F.2d 90 (1974), cert. den. 420 U.S. 1003, in connection with Petitioner's Motion For Judgment of Civil Contempt (App. p. 255). On a less than complete record, it was denied (App. p. 306).

November 19, 1974, it became clear to Petitioner, whose plans for a *privately financed* regional shopping center within its boundaries were moving forward, including appropriate zoning,[5] could not fairly compete with a federally subsidized regional shopping center in Santa Rosa. The latter was to be built on urban renewal land the acquisition cost of which was being financed by Respondent HUD at a total cost of about $28,000,000 (App. p. 6). Respondent City of Santa Rosa Urban Renewal Agency (hereinafter Urban Renewal Agency), with the approval of Respondent City of Santa Rosa's City Council, had acquired the land with federal funds, and, by an exclusive agreement with Respondent Hahn, proposed to sell this federally subsidized land only to Respondent Hahn at far less than its fair value (See App. pp. 169-172 for Stahr Affidavit on "fair value" filed by Petitioner and not contravened by any admissible evidence or any affidavit submitted by Respondents). Thus, since February 1972, this exclusive agreement has acted as a threat directed against Petitioner and effectively foreclosed by contract or conspiracy any

5. In September, 1974, the Santa Rosa Respondents filed an action in the Sonoma County Superior Court, the purpose of which was to enjoin any commercial development in Rohnert Park by invalidating the environmental impact report on its rezoning, thus eliminating any competition for the proposed regional shopping center in Santa Rosa. Judgment was entered for Rohnert Park in December, 1974, after a trial, and no appeal was taken. See *California Motor Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 30 L.Ed.2d 642, and *Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc.* (D.C. Wisc.) ..... F.Supp. ..... (1979) summarized at No. 939, ATTR of Nov. 15, 1979, at pp. A-16 to A-17. One baseless suit affecting business relationships of a competitor may support a claim for relief under the Sherman Act. Petitioner alleged that the Superior Court suit was brought for the anticompetitive purpose of enjoining "* * * any development of Plaintiff City's commercial site * * *." (App. p. 13).

effort by it to proceed with its own commercial development. Knowing that Respondent HUD would have to approve any land disposition price, Respondent Hahn and the Santa Rosa Respondents conspired with Respondent HUD to exclude Petitioner from the relevant market and to monopolize that market by obtaining an illegal subsidy —concurrence in a land disposition price at far less than its fair value.

In order to further its own proprietary interests and that of its specially assessed property owners and taxpayers, Petitioner adopted a general or master plan as required by California Government Code, Sections 65300 and 65302. It designated certain real property within its boundaries as a site for commercial development, including a privately financed regional shopping center (App. p. 4). As required by law, Petitioner also adopted zoning consistent with said general plan, zoning which as described earlier herein, the Santa Rosa Respondents unsuccessfully sought to enjoin for anticompetitive purposes.

On these facts, Petitioner has standing to seek declaratory and injunctive relief under Section 16, Clayton Act (15 U.S.C. 26) and judicial review of agency action by Respondent HUD under Sections 10 and 14 of the Administrative Procedure Act (5 U.S.C. 702, 706), as well as injunctive relief. It has such standing to vindicate the broad public interest in enforcement of the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 130, 23 L.Ed.2d 129, 152 ("* * * That remedy (Section 16) is characteristically available even though the plaintiff has not yet suffered actual injury, * * *."); *State of Washington v. Automobile Manufacturers Assn.* (C.A. 9) 538 F.2d 231, 235, 237 (1976), *State of California v. Automobile Manufacturers Assn.* (C.A. 9) 481 F.2d 122, 131 (1973), cert. den. 414 U.S. 1045, 38 L.Ed.2d 336 (1973); *Mid-West*

Paper Products Co. v. Continental Group Inc. supra, citing *Zenith Radio Corp.,* supra, with approval at page 594.[6] *Association of Data Processing Service Organization v. Camp* (1970) 397 U.S. 150, 153-154, 25 L.Ed.2d 184, 188. See *Sierra Club v. Morton* (1972) 405 U.S. 727, 733, 31 L.Ed.2d 636, 642. See also 42 U.S.C. 1441; *Barlow v. Collins* (1970) 397 U.S. 159, 162, 25 L.Ed.2d 192, 197; *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661, 671-672 (1975).

The Court of Appeals assumed without deciding that it would have jurisdiction of Petitioner's claim for relief under the antitrust laws against Respondent HUD and the Santa Rosa Respondents (App. p. 226). See *City of Lafayette, La. v. Louisiana Light & Power Co.* (1978) 435 U.S. 389, 55 L.Ed.2d 364, and *Hecht v. Pro-Football, Inc.* (C.A. D.C.) 444 F.2d 931 (1971), cert. den. 404 U.S. 1047, 30 L.Ed.2d 736. The District Court assumed without deciding that Respondents' activities involved interstate commerce (App. p. 185). See *Hospital Building Co. v. Rex Hospital Trustees* (1976) 425 U.S. 738, 48 L.Ed.2d 338, and Gruen Affidavit (App. pp. 179-183) filed by Petitioner and not contravened by any affidavits of Respondents. See also *Bratcher v. Akron Board of Realtors* (C.A. 7) 381 F.2d 723 (1967).

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6. See also 42 U.S.C. 3532(b): "(b) The Secretary (of HUD) shall, among his responsibilities * * *; encourage private enterprise to serve as large a part of the Nation's housing and urban development needs as it can and develop the fullest cooperation with private enterprise in achieving the objectives of the Department (of Housing and Urban Development); * * *." and *Grammercy Spire Tenants' Assn. v. Harris* (D.C. N.Y.) 446 F.Supp. 814, 821 (1977).

REASONS FOR GRANTING THE WRIT

IA

The Supreme Court of the United States Has the Inherent Power to Supervise the Administration of Justice in the Lower Courts, Particularly Where, as Here, the Decision Below Denies to Petitioner Due Process of Law, Thus Sanctioning a Radical Departure from the Accepted and Usual Course of Judicial Proceedings.

A. Article III, Section 1, Constitution of the United States vests in this Court "The judicial power of the United States * * *." In the exercise of such power, this Court is charged with supervisory functions in relation to proceedings in the federal courts. Moreover, meticulous regard for the integrity of the system of justice requires this Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

The disposition of this case by the Court of Appeals is one that requires that this Court intervene to make certain that justice is done. Here, on substantially less than a fully developed record, the Court of Appeals decided that Petitioner lacked standing to maintain any claim for relief under any of the federal statutes on which it relied. By so doing without notice or an opportunity to be heard, the Court deprived Petitioner of due process. This, it cannot do. *Singleton v. Wulff* (1976) 428 U.S. 106, 49 L.Ed.2d 826, 837. The fundamental premise of the holding there is the settled rule that no appellate court should determine the question of standing on the basis of a less than fully developed record.

To do so represents and is a violation of due process of law under the Fifth Amendment to the Constitution of the United States. See also *Hormel v. Helvering* (1941) 312

U.S. 552, 85 L.Ed. 1037, cited with approval in *Singleton,* supra, and *Warth v. Seldin,* supra, where this Court said at page 501:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. (Citation omitted.) At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."

The decision of Courts of Appeals in other circuits are generally in accord, e.g., *British Airways Board v. Port Authority of New York* (C.A. 2) 558 F.2d 75, 82 (1977); *Denton v. Mr. Swiss of Missouri, Inc.* (C.A. 8) 564 F.2d 236, 239 (1977)—"* * * the due process clause of the Fifth Amendment to the Constitution limits the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits (Citation omitted) * * *"; and *California Diversified Services Inc. v. Musick* (C.A. 9), supra.[7]

However, in the instant case, the Ninth Circuit did exactly what it said should *not* have been done in *Musick,* supra. There, under the heading "Due Process Issues," on page 280, the Court stated in part as follows, per Judge Eugene A. Wright, who also wrote for the Court in the instant case:

> "This court has held that, when jurisdiction is present, it is error to dismiss a claim on the merits without notice, a hearing, and an opportunity to respond, unless the complaint could not be corrected by amendment."

7. In the *Musick* case, the District Court dismissed the case *sua sponte.* Appellants moved for and were granted a hearing under Rule 60(b), Federal Rules of Civil Procedure. At the hearing the Court denied the motion to set aside the dismissal and to grant leave to amend, and an appeal was taken. The Ninth Circuit reversed and remanded, saying the power to dismiss *sua sponte* is not absolute. It held that the trial judge should have given notice of his intention to dismiss, an opportunity to write a memorandum in oposition, a hearing and an opportunity to amend.

On this less than fully developed record, the Court of Appeals could not and did not say it would be impossible for Petitioner to amend its complaint to state a claim for relief and standing to assert it. Notwithstanding, the Court of Appeals, in its *first* and *second* opinions[8] concluded that the action "* * * should have been dismissed * * *" for lack of standing (App. p. 240).

IB

Basic Tenets of Fairness Require That the Court of Appeals Should Not Consider Issues Involving Questions of Fact Not Resolved by the District Court.

B. Compounding its major error, as set forth in Subsection A above, the Court of Appeals made impermissible findings of fact on issues not resolved by the District Court. Accordingly, it must be reversed and remanded. *British Airways Board,* supra. In the instant case, the District Court did not reach or decide the relevant facts or the law with respect to the merits of Petitioner's claim for relief arising out of a violation of the National Housing Act of 1949, as amended [42 U.S.C. 1460(c)(4)] and for an order setting aside Respondent HUD's concurrence in the land disposition price of federally financed urban renewal land. Nevertheless, the Court of Appeals *did* decide the merits of Petitioner's claim for relief under the National Housing Act of 1949, as amended, and under the Administrative Procedure Act (5 U.S.C. 702), stating (App. pp. 238-239): "* * * the relationship between the injury here and the

8. Petitioner filed two petitions for rehearing. In the second, filed on August 9, 1979, it called the attention of the Court to the due process of law question. (App. pp. 245-246).

alleged illegal agency action is too attentuated to meet the minimum Article III requirement."[9]

However, in *British Airways Board,* supra, the Court stated in part on page 82:

> "Basic tenets of fairness required that a federal appellate court should not consider an issue involving questions of fact not resolved below. It is 'essential * * * that parties may have the opportunity to offer all evidence they believe relevant to the issues * * *.' (Citations omitted.) We are particularly reluctant to affirm the District Court's grant of summary judgment on another ground—especially one not advanced by the parties—where the effect is to deprive the appellant from disputing facts material to that claim. *Fruge's Heirs v. Blood Services,* 506 F.2d 841, 844 (5th Circuit. 1975). * * *."

See also *Carter v. Stanton* (1972) 405 U.S. 669, 31 L.Ed.2d 569. There, on page 671, this Court stated in part:

> "Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim* * * *." (Emphasis added.)

The District Court's Order (App. p. 183) is both "opaque and unilluminating" as to either the relevant facts or the law with respect to the merits of Petitioner's claim under the National Housing Act of 1949, as amended. It was not even mentioned.

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9. Relief, if granted under 5 U.S.C. 706(2) for violation of a relevant statute, would require the Court to "* * * hold unlawful and set aside agency action taken without observance of procedure required by law." Neither the District Court nor the Court of Appeals made any effort to deal with an indispensable link in the chain of causation—an attempt to reach an illegal end by illegal means.

In *Fountain v. Filson* (1949) 336 U.S. 681, 93 L.Ed. 971, this Court held that where summary judgment is granted on one issue, an appellate court may not extend that judgment to another issue under the guise of affirming the result below, when the effect is to preclude the losing party from disputing facts material to that claim. Accordingly, and in the absence of a fully developed record, Petitioner submits that this Court should reverse and remand for further proceedings as the only proper resolution of this proceeding. *Heirs of Fruge v. Blood Services* (C.A. 5) 506 F.2d 841 (1975). Summary judgment for defendant reversed and remanded for consideration of an issue not resolved by the trial court. See also *City of Hartford v. Towns of Glastonbury* (C.A. 2) 561 F.2d 1032 (1976) (en banc) at page 1051:

> "If this were an appeal from a judgment granting defendants' motion to dismiss for lack of standing, we should be required to accept as true all the material allegations of the complaint. * * * However, we are reviewing *a final judgment based on a fully developed record* and the issue of standing is one on which the plaintiffs bear the burden of proof. * * *." (Citations omitted and emphasis added.)

In the instant case, the record has *not* been fully developed, and the burden of proof on the issue of standing cannot be shifted to Petitioner. In fact, Respondents failed to probe, pierce or contradict many material allegations of the Complaint by affidavit or other admissible evidence, e.g., Paragraph V(b) of the Complaint (App. p. 5), which alleged as follows:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from doing so by the threat of

> a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."

and Paragraph VIII(b) (App. p. 8), referring to the natural and probable consequences of the exclusive agreement between Respondent Hahn and the Santa Rosa Respondents, all with the concurrence of Respondent HUD, which will be:

> "(b) To eliminate actual and potential competition from merchants located in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners."

Here, however, the Court of Appeals, in the role of protagonist has, without notice to Petitioner, and without supporting evidence, determined that its injury was too conjectural to merit relief, thereby making an impermissible finding of fact. To remedy Respondents' failures and to bolster its own unsupported conclusions, the Court of Appeals argued that before it could arrive at the point where Petitioner would be able to reap "the benefits of commercial development within its boundaries" (App. p. 239), it would have to make a number of assumptions. One such assumption would be "that financing would be available to fund an appropriate commercial development in Rohnert Park." (App. p. 239). However, no such assumption was or is necessary because of the above allegation quoted from Paragraph V(b). Since this and other material allegations were not probed or pierced by any evidence in a far less than fully developed record, they must be accepted as true by the Court of Appeals. Moreover, they raise a genuine issue of material fact. Rule 56(c), Federal Rules of Civil Procedure. On appeal, the Court of Appeals cannot make a finding contrary to these allegations, as it did in its *second* opinion, or make unsupported assumptions not pressed or raised by Respondents.

Pursuing further the matter of standing under the Administrative Procedure Act, the Court of Appeals argued that Petitioner "has failed to show that prospective injury to its proprietary interest 'is likely to be reduced by a favorable decision.' The scenario that would avert the injury is too 'conjectural' and 'hypothetical.'" (Citations omitted at App. pp. 239-240). The Court of Appeals also found that "* * * the relationship between the injury here and the alleged illegal agency action is too attenuated to meet the minimum Article III requirement."[10] Without a fully developed record, the quoted comments represent invalid and impermissible findings of fact and in conflict with decisions of this Court, *Carter v. Stanton, Warth v. Seldin,* and *Singleton v. Wulff,* all three cited supra.

II

The Decision Below Is in Conflict With a Decision in the Third Circuit, and a Hearing in This Court Will Secure Uniformity of Decision on the Requirements of Standing Within the Context of a Denial of Due Process of Law.

In *Mid-West Paper Products Co.,* supra, the Third Circuit, in an appeal from summary judgment, reversed and remanded, stating, *inter alia,* on page 590:

> "A private action for relief under § 16 is one of the weapons * * * in the arsenal established by Congress for policing the antitrust laws and for vindicating 'the important public interest in free competition.'" (Footnotes omitted.)

Petitioner submits that this case is in sharp conflict with the decision below. In *Mid-West Paper Products Co.,* the Third Circuit reversed and remanded since the District Court had not yet had occasion to determine whether

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10. This Court need not even reach the question whether Petitioner has a private right of action against Respondent HUD for violation of 42 U.S.C. 1460(c)(4), as the Court of Appeals did (App. pp. 231-232) relying on *Cort v. Ash* (1975) 422 U.S. 66, 45 L.Ed.2d 26. The point is that Respondents violated the law to reach an end forbidden under the antitrust laws.

plaintiffs there (indirect purchasers) had standing under Section 16 (15 U.S.C. 26) to state a claim for injunctive relief under principles of equity.

Petitioner submits that standing to maintain suits under Section 16, Clayton Act (15 U.S.C. 26) has gone largely unresolved. This Court has not expressed its opinion on this subject since its decisions in *Hawaii v. Standard Oil of California* (1972) 405 U.S. 251, 31 L.Ed.2d 184 (relief denied under § 4, but this Court merely discussed § 16 without applying it. All parties seemed to agree that the latter remedy might apply had injunctive relief been sought), and *Zenith Radio Corp.,* supra, at page 130, in 1969. Injunctive relief is available upon the demonstration of threatened injury, even though the plaintiff has not yet suffered actual injury, *Mid-West Paper Products Co.,* supra. As a result, the lower federal courts have adopted disparate approaches to this problem, and produced sharply conflicting holdings and reasoning. Moreover, because the various approaches lack sound analytical underpinning, even courts employing the same approach often fail to dispose of cases in a consistent, rational manner. In recent years, a number of judicial opinions have failed to make a critical distinction—the difference between antitrust standing and the scope of protection under substantive antitrust law.

Notwithstanding the constitutional power of the judiciary and a Congressional delimitation of the jurisdiction to exercise that power, the Court of Appeals concluded that Petitioner lacked standing, thereby deciding the threshold question not reached or decided by the District Court. So long as standing serves, on occasion, as a shorthand expression for all the various elements of justiciability, and serves interchangeably with other terms, such as ripeness, to sum up a judicious exercise of discretion in the use of the reviewing power, its convenience alone will preclude

this Court's adoption of more precision in the use of the concept. By the same token, discovering what the Court intends to convey when it relies on the concept will become increasingly difficult. That Petitioner, as well as all other persons seeking a judicial review on the merits, faces a difficult, perplexing and confusing task, is illustrated by the text which appears in Volume 13, Federal Practice and Procedure (Wright-Miller-Cooper), starting at page 54 of the 1978 Pocket Supplement, § 3531.

For example, the Court of Appeals, in its *second* opinion, cited *O'Shea v. Littleton* (1974) 414 U.S. 488, 38 L.Ed.2d 674 for the proposition that Petitioner's injury, whether real, immediate or threatened, was too "conjectural" and "hypothetical." Furthermore, the Court of Appeals said that the "prospective" injury to Petitioner would not in all likelihood be reduced by a favorable decision, presumably on the merits. These findings of fact on appeal are both erroneous and in excess of the appellate court's jurisdiction, since they (1) do violence to the provisions of Rule 56(c), Federal Rules of Civil Procedure, *British Airways Board,* supra; and (2) fail to accept as true all the material allegations of the complaint. *Warth v. Seldin,* supra.

In a later case, this Court held that a non-porfit corporation had standing to challenge racially discriminatory zoning practices. *Village of Arlington Heights v. Metropolitan Housing Development Corporation et al.* (1977) 429 U.S. 252, 50 L.Ed.2d 450. There, this Court stated on page 263:

> "It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing (Citations omitted). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest.

> See Sierra Club v. Morton, supra, at 739, 31 L.Ed.2d 636, 92 S.Ct. 1361. The specific project MHDC intends to build, whether or not it will generate profits, provides that essential dimension of specificity that informs judicial decision-making." (Citation omitted.)

Thus, this Court held that MHDC had met the constitutional requirements and it therefore had standing to assert its own rights "* * * Foremost among them is (its) MHDC's right to be free of arbitrary or irrational zoning actions." There can be no fundamental difference between this rationale and the right of Petitioner to be free of anticompetitive practices illegal under the Sherman Act (15 U.S.C. 2).

Unfortunately, however, this Court offered little new guidance for the task of locating the standing threshhold along the spectrum between the remedial benefits found too speculative in *Warth v. Seldin,* supra, and those found sufficiently probable in *Arlington Heights,* supra. However, the remedial benefits perspective on standing has taken on yet another aspect in *Duke Power Company v. Carolina Study Group* (1978) 438 U.S. 59, 57 L.Ed.2d 595. There, plaintiffs' action challenged the constitutionality of the Price-Anderson Act's limitation on liability for nuclear accidents. The plurality opinion of this Court agreed with the District Court that plaintiffs had Article III standing, but held that the Price-Anderson Act passed constitutional muster. On page 72, this Court stated as follows:

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues' (Citation omitted). As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury' to the plaintiff, (Citation omitted), but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." (Citations omitted.)

And on page 75, in Fn. 20, this Court also added in part that:

> "Our recent cases have required no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement." (Citations omitted.)

In *Duke Power Co.,* supra, this Court found probable redress of the injury claimed on the ground that invalidation of the liability limitation would probably leave the utility unable to complete construction and operation of the two nuclear plants. In the instant case, it is perfectly clear that the injunctive relief sought by Petitioner under 15 U.S.C. 26 would, if granted, prevent the Santa Rosa Respondents from conveying the land to Respondent Hahn for use by it in constructing the regional shopping center. Moreover, relief, if granted against Respondent HUD, would require that its unlawful concurrence in the land disposition price at less than its fair value be set aside [5 U.S.C. 706(2)],[11] and the Santa Rosa Respondents could not convey the land, the fair value of which is a genuine issue of a material fact, to Respondent Hahn.

While this Court, in *Duke Power Co.,* supra, did not mention the "zone of interest" test of standing that for nearly a decade has seemed to impose prudential limits on standing, Petitioner, being in the target area of the attempt or conspiracy to monopolize, clearly meets this test. It has alleged a geographic and economic nexus with the Santa Rosa site of the challenged project. It has also alleged and demonstrated a significant threat of distinct and palpable injury from an ongoing violation of the antitrust laws.

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11. The *only* admissible evidence on fair value was submitted by Petitioner in opposition to the motions for summary judgment. It appears in the Affidavit of R. Dean Stahr (App. pp. 169-172).

Moreover, neither the District Court, which was silent on the issue of standing, nor either one of the *two* opinions of the Court of Appeals dispute the existence of this nexus. In *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661, 672 (1975), the Court held that: "* * * municipal interests fall within the scope of NEPA's protections." By the same token, Petitioner's municipal interests fall within the protection of the antitrust laws. The Court of Appeals also held that Petitioner lacked standing to assert its claim for relief under Section 16, Clayton Act (15 U.S.C. 26), stating that Petitioner could not sue as *parens patriae* (App. p. 228). It does not claim standing as such and never has.

If the Court of Appeals meant that Petitioner lacked standing because it could not show "threatened loss or damage," it ignored relevant allegations of the Complaint. One of these (App. pp. 5, 8) was an allegation as follows:

> "Hence, this publicly subsidized project (in Santa Rosa) will render non-competitive and therefore impractical any project for a retail center not similarly subsidized in the vicinity of Defendant City."

Petitioner is in the target area of the conspiracy or attempt to monopolize. Therefore, it faces "threatened loss or damage" by reason of its exclusion from the relevant market for new retail space. In applying Section 16 (15 U.S.C. 26), the courts have held that complainants need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See page 591 of *Mid-West Paper Products,* supra, and cases cited in Fn. 72 thereof. Finally, the Court of Appeals said (App. p. 229) ". . . It (Petitioner) cites no authority supporting the contention that this (action in its proprietary capacity) is a sufficient proprietary interest under § 16, and we decline to so hold." Yet its Fn. 5 (App. p. 229) refers to

the very case Petitioner did cite for this contention, making a wholly artificial distinction between it and the instant case.

Accordingly, Petitioner submits that the Court of Appeals has introduced a formidable array of ambiguities that do not provide any guidance whatsoever through the minefield of standing doctrine. Its opinion shows a movement away from clarity toward additional obfuscation and away from liberalization toward a raising of standing barriers against plaintiffs in federal courts. Logically confused and inconsistent with relevant Supreme Court decisions, some cited supra, the Court of Appeals opinion in the instant case appears to be a far more insidious avoidance approach than was the older legal interest test. It has perpetuated a formalism that is showing signs of decay. See *Mid-West Paper Products,* supra.

Petitioner respectfully urges this Court to grant this writ for the purpose of (1) enunciating clearly and unambiguously the requirements of standing in non-constitutional federal question cases, and (2) securing uniformity of decisions in the federal courts. Prudential considerations aside, Petitioner submits that the sole test of standing should be whether it has been or will be adversely affected by unlawful governmental action, carried out in concert with others with an anticompetitive purpose. If direct proof of causal relationships is difficult or impossible, the trial and appellate courts should make a judgment whether a causal relation is sufficiently probable to allow standing, rather than an offhand statement that it is too attenuated to support standing. All the pleadings, indeed, the entire record can and should be carefully scrutinized in applying this test. Here, it was not.

CONCLUSION

For all the reasons stated above, Petitioner respectfully submits that the Court of Appeals has sanctioned a gross

and plainly erroneous departure from the accepted and usual course of judicial proceedings, has ruled in a manner fundamentally inconsistent and in direct conflict with its own decisions as well as those in other circuits and decisions of this Court. Therefore, Petitioner respectfully submits that this petition for writ of certiorari should be granted.

Dated, San Francisco, California
January 3, 1980

WILLIAM M. BRINTON
RICARDO J. HECHT

BY WILLIAM M. BRINTON
Attorneys for Petitioner.
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Petition for Writ of Certiorari and separate Appendix were mailed postage prepaid to the counsel of record of Respondents as stated below:

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Supreme Court, U. S.
FILED
FEB 25 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,

Petitioner,

v.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,

Respondents.

Appendices A Through K To Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Appendices A Through K
To
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Appendices

TABLE OF CONTENTS

Appendix		Page
A (1)	Affidavit of James K. Burns in Support of Motion for Summary Judgment and Motion to Dismiss [Note: Portions of Exhibits A and D, and Exhibits B and C in their entirety, have been omitted.]	1
A (2)	Affidavit of Richard E. Brandt in Support of Motion for Summary Judgment and Motion to Dismiss [Note: Exhibits have been omitted.]	38
A (3)	Affidavit of Joseph E. Coomes, Jr. in Support of Motion for Summary Judgment and Motion to Dismiss	43
B (1)	Affidavit of Julian A. Fitzhugh in Support of Federal Defendants' Motion for Summary Judgment	59
B (2)	Affidavit of Leevern Johnson in Support of Federal Defendants' Motion for Summary Judgment	66
C	Plaintiff's Brief in Opposition to Motions for Summary Judgment	69
D	Reply of Defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment	103
E	Second Affidavit of Richard E. Brandt in Support of Motion for Summary Judgment of Defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa	126

F Plaintiff's Supplemental Brief in Opposition to Motions for Summary Judgment and to Motion to Dismiss .. 147

G Supplemental Brief in Support of Motion for Summary Judgment and Motion to Dismiss of Defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa 159

H Opening Brief of Plaintiff - Appellant in Appeal from Judgment of the United States District Court, Northern District of California 176

I Response to Request by Appellant for Judicial Notice and Request by Appellee for Judicial Notice 180

J (1) Notice of Motion to Expunge Lis Pendens 199

J (2) Notice of Order Expunging Lis Pendens 202

K (1) California Health and Safety Code Section 33500 207

K (2) California Health and Safety Code Section 33501 208

K (3) California Health and Safety Code Section 33503 209

K (4) California Code of Civil Procedure Section 860 210

K (5) California Code of Civil Procedure Section 869 211

K (6) California Code of Civil Procedure Section 870 212

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United States District Court
Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

AFFIDAVIT OF JAMES K. BURNS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

STATE OF CALIFORNIA
COUNTY OF SONOMA

JAMES K. BURNS, being duly sworn, deposes and says:

I am the duly appointed Executive Director of the Santa Rosa Housing and Redevelopment Agency, which prior to 1975 was known as the Urban Renewal Agency of the City of Santa Rosa (hereafter "the Agency"). I have served continuously since October 1, 1971, as a chief administrator of urban renewal programs for the City of Santa Rosa. In this capacity I

have attended all meetings and hearings of the Agency, maintained the records, documents and minutes of the Agency, and rendered assistance and technical advice to the Agency members in connection with their exercise of the powers and discharge of the responsibilities conferred upon them by the Community Redevelopment Law and the City Council of the City of Santa Rosa.

1. THE SANTA ROSA CENTRAL BUSINESS DISTRICT URBAN RENEWAL PROJECT.

1.01 The Agency is engaged in carrying out an urban renewal (referred to as "redevelopment" in California Law) project in the central business district of Santa Rosa. The Agency records reflect the facts relating to the project set forth below in paragraphs 1.02-1.06.

1.02 The redevelopment plan for the project was first adopted by the Santa Rosa City Council on December 5, 1961, by Ordinance No. 1036. The approximate 40-acre area included in the project by the original redevelopment plan is known as Phase I.

1.03 In late 1969 and early 1970, after earthquakes on October 1, 1969, caused substantial damage to the downtown area, the Agency conducted studies directed toward expanding the boundaries of the project area. On March 10, 1970, the City Council by Ordinance No. 1436 adopted an amended redevelopment plan adding approximately 31 acres to the project. The area added to the project in 1970 is commonly referred to as Phase II.

1.04 Phase I and Phase II of the urban renewal project have received federal assistance under a loan and grant contract, which was originally executed by the Agency and the Housing and Home Finance Agency, a predecessor of the Department of Housing and Urban Development, on June 2, 1962. By the terms of the loan and grant contract the United States agreed to defray three-fourths of the net project costs and the Agency agreed to defray one-fourth of such costs. The loan and grant contract has been amended several times by agreement between the parties thereto. On or about September 14, 1970, the sixth amendatory loan and grant contract increased the total federal grant from $3,263,332.00 to $8,318,497.00 to reflect approval of federal assistance for the Phase II area.

1.05 On October 29, 1974, the Santa Rosa City Council held hearings hereafter described and adopted Ordinance 1741 amending the redevelopment plan to add the 12 acres known as Phase III to the project. Phase III does not receive assistance under the loan and grant contract.

1.06 Phase I and Phase II and Phase III are part of a single redevelopment project under state law. Phase I and Phase II have the designation of "The Santa Rosa Center Urban Renewal Project (Calif. R-45)" for federal assistance purposes.

1.07 The federal assistance under the loan and grant contract will total approximately $15.7 million. Of this amount approximately $14.1 million has already been spent by the Agency. The remaining $1.6 million has been obtained by the Agency through sale of Agency notes guaranteed by the federal government. The funds have been deposited by the Agency in an interest

bearing account and are being spent in accordance with an approved budget. The principal budgeted uses of the funds are for administration, interest on loans, site clearance, relocation and other costs which are not related in any way to the nature of the reuse of the presently undeveloped portion of the project area, regardless of whether that reuse is for a shopping center or some other form of development. Less than one-third of the remaining federal loan and grant funds are budgeted for construction of physical improvements of any kind, and the proposed physical improvements, such as street widening, are necessary and appropriate regardless of the particular land reuse.

1.08 I have requested additional loan and grant assistance for the project on behalf of the Agency, but I have been informed by Mr. Julian Fitzburgh and Michael Daughtery of H.U.D. that no such additional federal funding will be furnished under any circumstances.

2. NEGOTIATIONS WITH ERNEST W. HAHN, INC.

2.01 In late 1971 and early 1972 I personally called several real estate brokers and firms and retailing firms to determine the interest, if any, in developing a shopping center in the then undeveloped portion of the redevelopment project. After I determined that such interest did exist, the Agency authorized advertisements in the Santa Rosa Press-Democrat and the San Francisco Chronicle to solicit proposals from developers with experience in developing regional shopping centers.

2.02 Three developers responded to advertisements

published on March 1 and March 5, 1972, and were interviewed by the Agency staff and liasion committee on March 20, 1972.

2.03 On March 27, 1972, the Agency, after considering the report of its staff, authorized an agreement with Ernest W. Hahn, Inc. ("Hahn"), which provided for a 120 day period of exclusive negotiations between the Agency and Hahn during which Hahn would bear the cost of preparing a detailed proposal for the development of a regional shopping center.

2.04 On July 24, 1972, after hearing a progress report, the Agency extended the exclusive negotiations period by nine months. At the end of that period, Mr. Ernest W. Hahn informed the Agency that negotiations with two major department stores had reached the stage where it was necessary for Hahn and the Agency to enter into a predisposition to insure the stores' participation in development. He requested an additional 60 to 90 days in order to give attorneys time to prepare the predisposition agreement. On August 6, 1973, at the close of a noticed public hearing, the Agency approved and executed an agreement with Hahn entitled "Interim Agreement and Proposal to enter into a contract for sale of land for private development in Santa Rosa Center Project (Calif. R-45)". By the terms of the predisposition agreement, the Agency and Hahn agreed to enter into a future agreement for the disposition of land and development of a shopping center upon the satisfaction of several conditions, one such condition being the amendment of the existing redevelopment plan to add the area now referred to as Phase III. Under the agreement as proposed and later

executed Hahn is to acquire approximately 12 acres of Phase II and 9 acres of Phase III.

3. AMENDMENT OF THE SANTA ROSA REDEVELOPMENT PLAN

3.01 During the latter half of 1973 and in 1974, the Agency staff and special consultants conducted various studies of the Phase III area to determine its eligibility for redevelopment. These studies included a four-volume environmental impact report (EIR) prepared by URS Research Company, a structural engineering survey of the buildings in Phase III by Leonard S. Mosias & Associates, a financial analysis by Blyth, Eastman, Dillon & Company, and staff and City Agency investigations on relocation problems and social conditions within the area. As a result of these studies and investigations, the Agency prepared proposed amendments to the redevelopment to add Phase III and change street patterns in Phase II to accomodate the shopping center. The proposed amendments were processed in accordance with the requirements of the Community Redevelopment Law and approved by the City Planning Commission.

3.02 On December 31, 1973 and January 7, 1974, the Agency published notice that a draft EIR for the project had been prepared and was available for inspection by the public at the Agency office, that written comments could be submitted on the draft EIR until February 1, 1974, and that comments could also be made by appearance at a public hearing of the Agency to be held on January 28, 1974. The Agency responded to the comments and held a hearing on the final EIR on

October 16, 1974. The hearing was continued to October 29, 1974, at which time the Agency voted unanimously to certify the EIR as an EIR complying with the California Environmental Quality Act (CEQA).

3.03 At a second noticed public hearing held on October 29, 1974, the Agency considered the proposed contract with Hahn ("the Hahn contract") for sale of the shopping center site, which implemented the contingent proposal of the earlier predisposition agreement. The Agency tentatively approved the Hahn contract subject to concurrence by HUD. The administrative record of that hearing was prepared by the Agency and lodged with the Sonoma County Superior Court in connection with the action entitled *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.*, Sonoma County Superior Court Action No. 79762. Exhibit A to this affidavit is a true copy of that administrative record with exception that it does not include the final EIR for the project, the "Interim Agreement", or the Hahn contract as tentatively approved by the Agency. The tentatively approved Hahn contract is identical in all respects, except the time schedule for performance, to the Hahn contract finally approved by the Agency that is attached to this affidavit as part of Exhibit D.

3.04 At a joint public hearing on October 29, 1974, the City Council and Agency considered the two proposed amendments of the redevelopment plan. Prior to the hearing, I prepared and submitted to the members of the City Council a report to City Council, a true copy of which is attached to this affidavit as Exhibit B. This report summarized the numerous studies of consul-

tants, City departments, and the Agency staff concerning the characteristics of Phase II and its eligibility for inclusion within the project. The City Council also considered the final EIR for the project, which earlier the same day had been certified by the Agency as completed in compliance with CEQA, including the EIR's special market studies prepared in response to the suggestion that the proposed shopping center would monopolize trade in the Santa Rosa area and inflict competitive injuries on other retail establishments. A true copy of that market study is attached to this affidavit as Exhibit C.

3.05 At the joint hearing on October 29, I and my staff explained the Report to the City Council and oral testimony was given on the matters summarized in the report. After comments and testimony by members of the public, including the attorney for Codding Enterprises, the council adopted Ordinance No. 1741 adding Phase III to the project. Action on the amendment relating to Phase II streets was deferred pending concurrence by HUD because the loan and grant contract providing federal assistance to Phase II required such review and concurrence by HUD. Although the Phase II amendment and Hahn contract were promptly submitted for concurrence, I was informed by HUD officials that such concurrence would not be given until an environmental impact statement (EIS) was completed for the federally assisted project.

4. APPROVAL OF THE HAHN CONTRACT

4.01 In April of 1975 the Agency received, and commented on, the draft EIS for the project. In late summer, the Agency received a copy of the final EIS. At or about the time of cmpletion of the final EIS, I was advised, in discussions with Mr. Michael Daugherty of HUD, that another reuse appraisal should be prepared for the shopping center site because of the lengthy delay in concurrence. Reuse appraisals had previously been prepared by William Niethammer, M.A.I., of Niethammer & Myers in 1970, and by Richard U. Ratcliff, PhD, in November of 1972.In addition, a reuse appraisal for one parcel in the area had beer prepared by Conger & Fisk in January of 1972 and a study, review, and analysis summarizing past appraisals prepared by David E. Lane in June of 1973. All of the foregoing appraisals were submitted to HUD for its review; none of the appraisals indicated that the price of land to be paid by Hahn or the consideration to the Agency of the Hahn contract was inadequate or less than fair market value or fair value for uses in accordance with the redevelopment plan. All of these reuse appraisals were produced by me and presented to plaintiffs, the attorneys for plaintiff, Mr. Brinton and Mr. Hecht, at my deposition in this action on February 4th and February 5, 1975.

4.02 The new reuse appraisal David E. Lane was completed on October 1, 1975 and promptly submitted to HUD. In October Mr. Johnson, the HUD appraiser, visited the Agency to review the data included in the Lane appraisal. On about November 7, 1975, the Agency received HUD concurrence for the Hahn contract by letter from Mr. Salvatore Tedesco, Director of the San Francisco based Technical Services Branch of HUD. The same letter concurred in the Hahn contract

cash price for disposition of Phase II land.

4.03 Prior to HUD concurrence in the Hahn contract and its disposition price, HUD separately concurred in the Phase II plan amendment. The City Council again considered the amendment and adopted it as Ordinance No. 1791 on November 4, 1975.

4.04 On November 14th and November 21, 1975, the Agency published notice that it would hold a public hearing on December 1, 1975 to take final action on the Hahn contract. At that hearing the Agency received the Lane appraisal and Mr. Lane's unrebutted testimony on the appraisal conclusion, that the fair value of the property for reuse was $2.00 per square foot, substantially less than the price to be paid by Hahn. The Agency also considered the other testimony and evidence which is set forth in the transcript included as part of Exhibit D. No appearance was made at the hearing on behalf of plaintiff, nor was conflicting appraisal evidence offered. At the close of the hearing, the Agency unanimously approved the Hahn contract after finding the consideration from Hahn was not less than fair value for reuse in accordance with the plan. The administrative record of the hearing held on December 1, 1975 was prepared and lodged with the Sonoma County Superior Court in connection with the validating proceedings on the amendments to the redevelopment plan. Exhibit D to this affidavit is a true copy of that administrative record, except that it does not include the project EIS which was presented to the Agency at the hearing.

5. CONCLUSION

The foregoing matters are true of my own personal knowledge, and, if called as a witness, I can competently testify thereto. This affidavit is submitted in Support of the Motion for Summary Judgment and Motion to Dismiss of Defendants City of Santa and the Urban Renewal Agency of the City of Santa Rosa.

DATED: August 19, 1976

JAMES K. BURNS

STATE OF CALIFORNIA
COUNTY OF SONOMA

On _____, 1976, before me, a Notary Public, personally appeared JAMES K. BURNS, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

_____

EXHIBIT A

URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA
SPECIAL MEETING
October 29, 1974
MINUTES

Convened The members of the Urban Renewal Agency of the City of Santa Rosa met in Special Meeting at 1:00 p.m. in the City Council Chambers, City Hall, Santa Rosa, California, on the 29th day of October 1974.

The Chairman called the meeting to order, and on roll call, the following answered present: Chairman Ted Grosman, Vice Chairman George B. Schmoll, Mr. Frederick L. Browne, Mr. Michael Panas, and Mr. George R. Sutherland, Jr.

Others present included: Executive Director James K. Burns, Special Counsel Joseph E. Coomes, Jr., General Counsel Richard B. Maxwell, and other Agency staff members.

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Public Hearing - Hahn Agreement Executive Director Burns reported that the Notice of this hearing was advertised in the Press Democrat on October 14 and October 21, and he submitted the Proof of Publication for the record. Mr. Burns then briefly reviewed the events leading to this public hearing such as the solicitation of regional shopping center developers, the signing of the Exclusive Negotiations Agreement with the Hahn Company, and the Interim

Agreement. Mr. Burns introduced Mr. Ernest W. Hahn, Chairman of the Board of Ernest W. Hahn, Inc.

Mr. Hahn stated that substantial progress has been made during this time of negotiations and he praised the community for providing input into the design of the shopping center. Mr. Hahn mentioned that he has had the privilege of seeing literature regarding the shopping center — both pro and con — and he thought it would be appropriate to comment at this time on the erronious nature of statements being made concerning subsidies.

Mr. Hahn referred to the California Redevelopment Act and its purpose. He stated that a strong retail downtown is necessary in order to provide further taxable growth and that a city cannot revitalize its downtown without the polarization of regional department stores. As to statements made by Codding Enterprises that the figures in the EIR were incorrect, Mr. Hahn reported that it takes 4.5 square feet of conventional department store space to satisfactorily serve the needs of each person. With Santa Rosa's primary and secondary trade area, Santa Rosa is deficient in this category and can use additional department stores. Mr. Hahn noted at this point that a third major high-line department store consisting of some 80,000 square feet will be added to the shopping center within a year or two after completion of the facility. Mr. Hahn suggested that it would be to Santa Rosa's

advantage to keep the shoppers in Santa Rosa and not in their automobiles driving to San Francisco to shop.

Mr. Hahn produced a "Heritage Square" brochure which contends that Macys and Sears would be included in that project. He reported that he had recently discussed the statement made in the brochure with both Macys and Sears and was told they are definitely not interested in this concept — not now or at any future date — even if the Hahn project were not developed. These majors are only interested in locating stores in a modern, up-to-date facility that would be integrated with downtown.

Mr. Hahn briefly reviewed the anticipated costs of the shopping center and advised that this center constructed downtown will cost approximately $6,000,000 more than one constructed in a suburban area. Some of the reasons for this is the No. 1 fire zone, more vertical transportation, parking structures, etc. This means that the rental structure will be somewhat higher and that the developer will have to absorb some of the increased costs out of the profit. He pointed out that this subsidy from the developer by far exceeds any subsidy from the redevelopment agency in the way of project improvements.

He further advised that existing businesses in the Santa Rosa area will benefit from the increased retail activities generated by the shopping center. He also pointed out that there are

many people in the Santa Rosa area who hold Macys credit cards and are apparently shopping in other communities. With a Macys here in Santa Rosa, the money will stay in Santa Rosa.

Referring again to the Heritage Square model on display, Mr. Hahn stated that many buildings depicted in the model are nontaxpaying structures, and to say the project can be built without the use of general obligation bonds is irresponsible.

Mr. Hahn concluded by repeating the fact that Sears and Macys are financially involved in the downtown Hahn project, and that he is ready to proceed in a constructive manner to build one of the finest developments in the area.

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Adjournment There being no further business to come before the Agency at this meeting, the Chairman adjourned the meeting.

M.E. KARAGAN
Recording Secretary
APPROVED: Ted Grosman
Chairman

ATTEST: James K. Burns
Secretary

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EXHIBIT D
SANTA ROSA COMMUNITY DEVELOPMENT COMMISSION
SPECIAL MEETING
DECEMBER 1, 1975
MINUTES

Convened The members of the Santa Rosa Community Development Commission met in Special Meeting at 4:00 p.m., on the 1st day of December 1975, in the City Council Chambers, City Hall, Santa Rosa, California.

The Chairman called the meeting to order, and on roll call, the following answered present: Chairman Ted Grosman, Commissioners Frederick L. Browne, Michael Panas, and George R. Sutherland, Jr. Vice Chairman George B. Schmoll was absent.

Others present included: Executive Director James K. Burns, Special Counsel Joseph E. Coomes, Jr., General Counsel Richard B. Maxwell, and other Commission staff members.

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Appraiser David E. Lane reviewed the process involved in preparing his reuse appraisal of the shopping center site, and following thorough investigation and analysis, concluded that the fair market value of the land would be $2.00 per square foot, or $2.6 million for the 30 acres to be sold to the Hahn Company. Mr. Lane also determined that the highest and best use of the site would be a regional shopping center constructed as a single project. He noted that if the property was sold in small parcels, it would take

a minimum of ten years to develop the area. Mr. Lane indicated that the economic benefits to the community would be great in terms of values, rents, and gross retail sales when the shopping center is completed.

Mr. Ernest W. Hahn, Chief Executive Officer of Ernest W. Hahn, Inc., was present at the meeting and stated that since the last hearing in October 1974, the design of the shopping center has had constant study by the Commission and the City Design Review Board. As a result, B Street was changed to encourage activity between the proposed center and the existing downtown retail area, and a pedestrian extension has been planned through Fourth Street to Railroad Square. Further, Macy's will be somewhat larger, and negotiations are continuing for a third major department store. In response to allegations made regarding "subsidy", Mr. Hahn proceeded to compare the cost of developing a suburban shopping center versus the cost of developing a shopping center downtown. It was found that the downtown center will cost the Hahn Company about $5.6 million more than it would if he developed the center in a suburban area. He noted that each day lost in moving this project forward costs a minimum of $10,000 in cost increases, or $3.7 million per year, plus loss of substantial revenue to the taxing agencies. Also, construction of the center will employ 2,000 to 2,500 construction workers and suppliers, and upon completion, there will

be permanent employment for 2,000 persons. In conclusion, Mr. Hahn pledged continued support and cooperation, and stated he is anxiously awaiting the signing of the final documents.

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Executive Session The Chairman recessed the meeting at this time for an executive session.

Adjournment Following the executive session, the meeting was adjourned. (Item No. 11 on the agenda was held over for the next meeting).

M.E. KARAGAN
Recording Secretary

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APPRAISAL REPORT
of

SANTA ROSA CENTER PROJECT
(Calif *R*-45)
RE-USE VALUES
Phase II and Phase III

for

SANTA ROSA COMMUNITY DEVELOPMENT COMMISSION
as of
October 1, 1975
by
DAVID E. LANE, MAI, SREA
Real Estate Appraiser

October 10, 1975

Mr. James K. Burns
Executive Director
Santa Rosa Community
Development Commission
P.O. Box 1678
Santa Rosa, CA 95403

Re: Re-Use Appraisal Santa Rosa Center Project

Dear Mr. Burns:

Please refer to my appraisal report dated October 1, 1975, relating to Phase II and Phase III re-use values. Inadvertently omitted from that report was the following limiting condition:

> The Redevelopment Plan permits apartments to be developed in a portion of the Project, although the basic land use is designated commercial. Since

this residential use is a lower one, insofar as values are concerned, no specific investigation has been made relative to a value for residential use of the area between First and Third, "A" and "B" Streets.

In addition to the above, please note the following corrections or comments:

On page 9, fourth line from the bottom, "Stowair Inc." should read "Stol Air Commuter."

On page 27, under "Flamingo One Stop Shopping Center." Omitted from the text is the fact that Long's Drugs is a prime tenant in the center.

On page 36, third paragraph, it is stated that the "price for the corner of Third and "B" is *$8.00* per square foot." The $8.00 per square foot should refer to the corner of *Fourth* and "B", which is Parcel DD, and which is part of the same disposition arrangement for the relocation of the Wells Fargo Bank to Third and "B". The latter corner, which is presently a City parking lot, is being acquired from the City for $300,000 for a net area of 26,337 square feet, or *$11.39* per square foot.

The above is for the purpose of clarification only. My conclusion as to the inapplicability of these prices to the subject evaluation is still valid, i.e., that this development is a result of the Hahn regional shopping center proposal, and these prices are an indication of the effect of such a development on land nearby. They are not relative to valuing the shopping center land itself.

If I can be of any further assistance, please advise.

Sincerely,

DAVID E. LANE, MAI, SREA

October 1, 1975

Mr. James K. Burns
Executive Director
Santa Rosa Community
Development Commission
P.O. Box 1678
Santa Rosa, CA 95403

Re: Re-Use Appraisal, Santa Rosa Center Project

Dear Mr. Burns:

Pursuant to your request, I have made an investigation and analysis relative to estimating the re-use value of 30 acres lying in the Santa Rosa Center Project.

It is my opinion that the fair values for re-use in accordance with the Redevelopment Plan of said Project, are as follows:

Phase II (21 acres)	$1,829,520
Phase III (9 acres)	784,080
Total	$2,613,600

The above values are based on a unit value of $2.00 per square foot, or $87,120 per acre. Other principal findings and conclusions are:

(a) The highest and best use of the 30 acres is for a regional shopping center;

(b) In the absence of such a use, the holding period until completion of land disposition is about ten years;

(c) The financial terms of the Hahn contract are of substantial benefit to the Santa Rosa community and, in particular, to the central business district; and

(d) Given the unique location and the right timing with respect to the need for a regional shopping center

in the trade area, no marketing program is necessary to dispose of the property.

You will find the reasoning for the conclusion of value and the findings on the pages following.

Thank you for the opportunity of making this appraisal.

Respectfully submitted,
DAVID E. LANE, MAI, SREA

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HAHN CONTRACT

In addition to valuing the land in Phases II and III under the restrictions and requirements of the Redevelopment Plan, I have been requested to analyze its value considering the specific terms of a proposed contract with Ernest W. Hahn, Inc., developer, and considering the schematic plans prepared by that developer for a regional shopping center.

The pertinent terms of the contract are assumed to be as follows:

(a) Hahn is to pay $3 million for the 30 acres;

(b) Hahn is to construct a regional shopping center of initially a minimum of 597,600 square feet of gross leasable area with at least two major department stores, and ultimately not less than 673,200 square feet with three department stores;

(c) Hahn is to construct surface parking spaces and parking structures at a fixed cost to the Commission of $2 million;

(d) Hahn is to reconvey the parking areas, which will be operated and maintained by the City; and

[1](e) Hahn is to pay $.49 per square foot of gross leasable area or $401,000 per year, whichever is greater, to cover in-lieu taxes, operation, and maintenance of the parking, which is to be free to the public throughout the downtown area; this increases to not to exceed $.65 per square foot in the 11th-20th years.

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[1]NOTE: Under an alternative "B" of the contract, the Commission would have the option of conveying the Phase III land without cost, and making a $1 million contribution in site improvements, with the developer paying all costs of construction, operation, and maintenance of the parking. The economic result appears to be the same.

Details of the proposed shopping center are described hereinafter. They are based on a "schematic proposal" prepared by John S. Bolles Associates Architects on September 17, 1975.

They provide for a two-level enclosed mall of 120,640 square feet; a Sears store of 161,342 GLA, including TBA; a Macy's store of 126,000 GLA; a third department store of 75,600 GLA; 350,000 GLA in four mall buildings; 20,163 square feet in theater and shops; and 533,900 square feet in the two floors of three-level parking structures with total on-site spaces of 2,834 (including 2,200 in the structures) and an additional 651 spaces off-site.

The gross leasable area totals 733,105 square feet.

HAHN PROPOSED IMPROVEMENTS

The major portion of the project consists of 7 two-story retail sales buildings joined together by a two-level, enclosed air-conditioned pedestrian mall. The mall runs in a north-south direction with the facade of the shopping center facing "B" Street. Two 3-level parking structures are located between the mall buildings and Freeway 101. Two single-story buildings to house small retail shops and two theaters are located on either side of the main pedestrian entrance to the shopping center at Fourth and "B" Streets. From this point a pedestrian walkway runs through the shopping center west to Morgan Street. A one-story structure located to the south of the parking structures will house a TBA facility (tires, batteries and accessories). The first story of all structures is at grade level.

Automobile entrances to the parking areas are from

the Highway 101 off-ramp, First Street, Third Street, Seventh Street, Morgan Street, "A" and "B" Streets. Access to service driveways located between the main buildings and the parking structures is from First Street, Third Street, and the corner of "A" and Sixth Streets.

A portion of the two-story main shopping center complex will span across Third Street, which is to be depressed below grade. The decking of the depressed street area and the improvement of the air rights is a responsibility of the developer.

Primary tenants of the shopping center to date are Macy's, which will be located at the north end of the mall and Sears, which will be located at the south end. Intervening structures located off the enclosed mall are labeled; Future, A, B, C & D. The structure labeled "Future" will house the third major retail store of the complex. Structures A, B, C & D will house smaller retail shops offering goods and services. The TBA facility will be operated by Sears. The two structures on either side of the main pedestrian entrance will house small retail shops and two theaters with a total seating capacity of 736.

Gross leasable area of the shopping center is 733,105 square feet, including the theater. The breakdown is:

	Gross Leasable Area
Sears (including TBA)	161,342
Macy's	126,000
Future	75,600
Building "A"	77,600

Building "B"	41,030
Building "C"	119,030
Building "D"	112,340
Fourth Street Shops	10,800
Theater	9,363
	733,105 sq. ft.

The enclosed mall contains a gross area of 120,640 square feet.

The architect calculates total off-street parking of 3,485 spaces, tabulated as follows:

Parking Structure No. 1 (3 levels)	1,397
Parking Structure No. 2 (3 levels)	803
On-site grade parking	634
Total on-site parking	2,834
Freeway-site parking	163
Off-site parking	488
Total available	3,485 spaces

The area of the parking structures is 533,900 square feet. The ratio of total parking spaces to GLA is 4.75 per 1,000 square feet of total retail space, including the theater. The architect calculates 5.23/1,000 based on net sales areas of the mall stores only. Using the on-site spaces only of 2,834, the ratio is 3.87/1,000.

COST OF SHOPPING CENTER

Based on the schematic layout, any estimate of the cost of constructing the Hahn project involves very rough figures only. My estimates are based on the following:

Site preparation:	
Relocate aqueduct	$300,000

Bridge 3rd Street	500,000
General site work	150,000
Total, site preparation	$ 950,000
Buildings:	
Department stores:	
341,450 s.f. @ $30/s.f.	10,243,500
TBA (Sears)	
21,492 s.f. @ $18/s.f.	386,856
Mall shops:	
350,000 s.f. @ $32/s.f.	11,200,000
Enclosed mall:	
120,640 s.f. @ $15/s.f.	1,809,600
Entrance shops:	
10,800 s.f. @ $28/s.f.	302,400
Theater:	
9,363 s.f. @ $37/s.f.	346,431
Parking structures:	
533,900 s.f. @ $13/s.f.	6,940,700[1]
Surface parking, landscaping	850,000
Total direct costs	$33,029,487
Plus indirect costs:	
Pre-development expenses, taxes and interest during construction, etc.: 10%	+ 3,302,949
	$36,332,436
Less contribution to parking	− 2,000,000
Net cost to developer	$34,332,436
Say	$34.5 million

[1]Equals $3,155 per space, including ground level. This cost is very dependent upon the quality and design of the garage. The estimate is considered a median figure.

Although the parking is to be publicly-owned and operated, the developer under the contract is obligated to construct the surface parking and construct or guarantee the construction of the structures at a cost to the Commission of not to exceed $2 million. Therefore, the latter amount must be deducted from the total capital cost of the Hahn development, but almost $5.5 million attributable to parking must be left in, since the developer is responsible for constructing the parking, even though he will not own or operate it.

The estimated cost of the structures, at $6,940,700, equals $3,155 per space for the 2,200 spaces in the garage buildings. Added to this is another $400,000 for 634 on-site surface spaces, for a total of $7.34 million. It is assumed that the 651 "off-site" spaces will be paid for by the City or others.

Therefore, only about $27 million of the $34.5 million estimated cost of the improvements would be depreciable assets (under alternative "A" of the contract).

RESIDUAL ANALYSIS

In this analysis, an estimate of the economic rental value is made, and to arrive at a net annual income stream, deductions are made for vacancy allowance, taxes, insurance, maintenance, management, other operating expenses, and depreciation and interest on the improvements. The resulting residual income represents some indication of a land value.

This analysis, because it involves considerable estimating and judgment factors, is used primarily for the purpose of being a check on the other methods, and

for establishing a reasonable range within which the land price should fall, considering the specific proposed project.

Estimated annual gross income:		
Department stores:		
341,450 s.f. @ $3/s.f.		$ 1,024,350
TBA (Sears):		
21,492 s.f. @ $2/s.f.		42,984
Mall shops:		
350,000 s.f. @ $9/s.f.		3,150,000
Entrance shops:		
10,800 s.f. @ $12/s.f.		129,600
Theater:		
736 seats @ $100/seat		73,600
Total annual gross		$ 4,420,534
Less vacancy allowance: 2%		− 88,410
Effective gross income		$ 4,332,124
Expenses:		
Taxes	$900,000	
Insurance	35,000	
Building maintenance	40,000	
Parking in-lieu payment	401,000	
Utilities	100,000	
Advertising & promotion	75,000	
Management	150,000	
Total expenses		−1,701,000
Net to land & improvements		$ 2,631,124
Improvement charges:		
$27 million cost, excluding parking: 7.5% return + 2% recapture = 9.5% × $27 million		−2,565,000

Net to land	$ 66,124
$66,124 capitalized at 7.5% =	$ 881,653

$881,653 ÷ 30 acres = $29,388/acre, or $.67/s.f.

Because of the small ratio of residual land value to total capital investment, the foregoing analysis is not used as a direct indication of value. Note that an increase in the interest rate from 7.5% to just 7.75% would wipe out all of the residual ($27 million times .0975 = $2,632,500 vs. net of $2,631,124). Also, all of the figures are still rough estimates only.

It should also be recognized that the rents in the project are more a function or result of costs rather than comparison with existing rates in the community. This is because of the unique nature of the center, its customer drawing power, the presence of the department store magnets, its monopoly position, and the fact that, within obvious limits, the rents have to be commensurate with the costs involved, or the project cannot be built.

CONCLUSION OF VALUE

Value Under the Plan

The indication of value from larger sales and listings is *$2.00* per square foot.

The indication of value from subdividing the land into average 20,000-square foot parcels is $3.00 per square foot, assuming a lengthy selling period. This would probably involve no more than 30 parcels, assuming about half the area would be in surface parking. The configuration of the parcels would be quite awkward and uneconomic, however, because of the

Plan's closing of most of the interior streets ("A", Second, Fourth, and Fifth).[1] It would leave too much depth in most instances, unless the parking was scattered in small lots throughout the project, thereby utilizing the large rear areas.

To sell 30 parcels, given the assumption of no new regional shopping center going downtown, would take an estimated ten years, or an average of three parcels per year.

Assuming holding costs of 12% (3.5% taxes and 8.5% interest), the present worth of receiving 1/10th of the disposition proceeds each year for 10 years equals:

Factor 5.650 times $.30 = *$1.70*/s.f.

The factor represents the present worth of $1 per annum discounted at 12%. The $.30 represents 1/10th of the value per year ($3.00 × 10%). The $1.70 per square foot represents a present average cash value of the land.

Not reflected in the above calculations is the possibility of increasing land values as time goes by, so that holding costs might be offset somewhat. Other projects, however, which have not involved a regional center and where timing of new construction has been poor, have experienced the reverse situation with respect to typical retail commercial redevelopment areas, i.e., declining values for the undeveloped land.

It is my opinion that in the absence of the regional shopping center approach, most of the subject land would remain a wasteland of open space for a long

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[1]Based on latest Land Use Map, which has been approved by the Commission and HUD, but not by the City Council as yet.

period of time.

It is my conclusion that the market value of the subject 30 acres, considering all conditions of the Redevelopment Plan, is:

30 acres × 43,560 s.f. = 1,306,800 s.f. @ $2.00/s.f. =	$2,613,600
Allocated:	
Phase II: 70% (21 acres)	$1,829,520
Phase III: 30% (9 acres)	$ 784,080

Effect of the Hahn Contract

There are both tangible and intangible benefits to the Commission and the City under the Hahn contract, making it difficult to measure them in the sense that a dollar value can be established.

The $3 million to be paid by Hahn is more than a fair price to the City and the Commission, especially when consideration is given to the obligations on the part of Hahn to (a) pay for two 3-level garages in excess of the $2 million Commission contribution; (b) construct all on-site surface parking; and (c) contribute at least $401,000 per year to the parking district.

My cost analysis (see page 61) indicates that almost $5.5 million will be the net cost to the developer for the parking, after deducting $2 million for the Commission's contribution.

In addition, the City will receive $401,000 "in-lieu payment", which sum is reportedly enough to cover in-lieu taxes, operating expenses, maintenance, and provide free parking throughout the downtown area.

The estimated $5.5 million net cost is a necessary

expenditure to get vertical parking in a tight area of only 30 acres for a regional shopping center. If this were a typical suburban center, the developer would install the 3,485 parking spaces (including those which are "off-site") on the ground level spread over his acreage, probably covering another 30 acres. His costs for this would probably not exceed $1,000 per space, including the extra land needed, or $3.485 million. Therefore:

Hahn parking costs	$5.5 million
Suburban center parking	−3.5 million
"Extra" parking costs to Hahn	$2.0 million

It should be noted that the surface parking and parking structures, although primarily financed by Hahn, will be in the control of the parking district as public parking (under alternative "A"), and as such will be available to serve an area broader than the proposed shopping center alone.

The only real alternative to the Hahn contract, other than securing another developer under basically the same terms, would be to construct surface parking lots on about half the acreage and build on the other half. There is a problem here, however, since the Plan calls for only 25% land coverage on the Central Business "C" blocks along the freeway, unless they are used for parking. In the absence of using the shopping center concept, this places the parking too far from the parcels that could be built on in Central Business "D" east of "A" Street.

In any event, the following rough analysis is made in order to confirm the conclusions made of the Hahn contract:

Of the 1,306,800 square feet (30 acres), about 794,000[1] of them would be required for parking, landscaping, etc. if all of it is ground-level only, and if the same Hahn ratio of 3.87/1,000 (on-site only) were to be maintained. This leaves 512,800 square feet for buildings. This compares to 733,105 under the Hahn plan, a loss of 220,305 square feet by not building vertically. The number of spaces would be 1,985 (512.8 × 3.87), a reduction of 849 from the Hahn on-site parking total of 2,834.

Assuming 350 s.f. per space in public parking areas, then 694,750 square feet of land would be required, leaving 612,000 square feet of land area to be sold for private development.

The conclusions to be drawn from the foregoing comparisons are as follows:

1. The regional shopping center concept would probably generate over 200,000 additional square feet of building area.

2. It would provide over 800 more parking spaces. (Note: This is quite conservative, because the ratio of parking to building area under the small-parcel method would probably be much less than the 3.87/1,000 derived from the intensive retail development of Hahn. This does, however, release more land for building area if the ratio is less.)

3. The smaller-parcel concept, whereby parking would be built in stages, means that there would probably be no free parking and the City would have to continue to tax in order to get funds for land acquisition from the Project; construction; maintenance; and operating expenses.

[1] 3.87 × 400 s.f. (includes setbacks, landscaping, walks) = 1.548 s.f. of open space for each 1,000 s.f. of building. 1,306,800 divided by 2.548 = 512,873 s.f. of building. 1,306,800 less 512,873 = 793,927 s.f. of open land.

4. Only 47% (612,000 s.f. ÷ 1,306,800 s.f.) of the 30 acres would be in private ownership for taxation purposes, compared to about 19 acres, or over 63% under the Hahn contract. (But because of the $401,000 in-lieu payment, the tax situation is actually much better than if the 11 acres were in private ownership.)

5. With a parking cost of about $7.5 million, if this part of the project remained in private ownership, the total taxes generated for the community would be approximately $262,500 ($7.5 million times 3.5%). This compares to the in-lieu payment of $401,000 annually under the Hahn contract.

6. In addition to the much higher amount of general taxes generated by the higher-valued and more extensive construction under the regional shopping center approach, the $1 per $100 of assessed value tax for the parking district would probably generate only the following compared to $401,000:

612,000 s.f. of private land @ $3/s.f.	$ 1,836,000
512,800 s.f. of buildings @ $30/s.f.	15,384,000
Total value, as smaller parcels	$17,220,000

$17,220,000 × 25% = $4,305,000 assessed value = $43,050 × $1 = $43,050 per year.

The above does not include the taxes from fixtures

and personal property; however, it also does not reflect the substantial discount for time. Unless the rate were substantially increased, it is far below the guaranteed $401,000 under the Hahn contract.

7. In addition to completing and closing the project much faster, the Commission would be dealing with one entity only for ease of planning, design, and coordination. There would be no need to "market" the land, because its location and the economics of the area establish its highest and best use as a regional shopping center.

8. The placement of two to three department stores on this land will have a tremendous beneficial impact on values of surrounding downtown property. These are fringe benefits, not immediately measurable in terms of dollars. But this fact is an important consideration insofar as the determination of the concept of development of the 30 acres is concerned. There may be some dislocation in the older CBD to the east, but it should not be too great (nor long-lasting) because of the proximity of the project to the existing good retail area.

Final Conclusion

It is therefore my conclusion that the fair re-use value of the land described herein, subject to the limiting conditions hereof, is as follows:

1,306,800 s.f. @ $2.00/s.f. =	$2,613,600
The above estimate is allocated:	
Phase II: 70% (21 acres)	$1,829,520
Phase III: 30% (9 acres)	$ 784,080

The above estimates are subject to change after a survey of the exact areas involved. The $2.00 per square foot is considered to be the constant amount.

CERTIFICATION

The undersigned does hereby certify that, except as otherwise noted in this appraisal report:

1. I have no present or contemplated future interest in the real estate that is the subject of this appraisal report.

2. I have no personal interest or bias with respect to the subject matter of this appraisal report or the parties involved.

3. To the best of my knowledge and belief the statements of fact contained in this appraisal report, upon which the analyses, opinions and conclusions expressed herein are based, are true and correct.

4. This appraisal report sets forth all of the limiting conditions (imposed by the terms of my assignment or by the undersigned) affecting the analyses, opinions, and conclusions contained in this report.

5. This appraisal report has been made in conformity with and is subject to the requirements of the Code of Professional Ethics and Standards of Professional Conduct of the American Institute of Real Estate Appraisers of the National Association of Real Estate Boards.

6. No one other than the undersigned prepared the analyses, conclusions and opinions concerning real estate that are set forth in this appraisal report.

DAVID E. LANE, MAI, SREA

****

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Attorneys for Defendants

United States District Court
Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

AFFIDAVIT OF RICHARD E. BRANDT
IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT AND MOTION TO DISMISS

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

RICHARD E. BRANDT, being duly sworn, deposes and says:

1. I am an attorney at law and admitted to practice before the courts of the State of California and the United States Federal District Court for the Northern District of California. During the past three years, I and Joseph E. Coomes, Jr., of the same firm have represented the City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (now known as

"the Santa Rosa Community Development Commission") in several law suits filed involving the downtown Santa Rosa redevelopment project and certain other matters.

2. Among the suits in which I have participated as attorney for the City and the Agency are this suit, *City of Rohnert Park* v. *James T. Lynn, et al.; Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.*, Sonoma County Superior Court, Action No. 79762; and *Codding Enterprises* v. *Santa Rosa Community Development Commission, et al.*, Sonoma County Superior Court Action No. 84237. This firm also represented the City of Santa Rosa and the Agency in *City of Santa Rosa and The Urban Renewal Agency of The City of Santa Rosa* v. *City of Rohnert Park*, Sonoma County Superior Court Action No. 78756, referred to in the complaint in this action.

3. Sonoma County Superior Court Action No. 79762 is a validating proceeding challenging the validity of Ordinance No. 1741 of the Santa Rosa City Council, which amended the redevelopment plan for the Santa Rosa downtown project to include the area known as Phase III within the project area. Exhibit A to this affidavit is a true copy of the First Amended Complaint in Action No. 79762, the last pleading of plaintiff in the suit other than a supplemental complaint adding the allegation the Ordinance was invalid for an alleged conflict of interest. Exhibit B to this affidavit is a true copy of the summons and proof of publication required by Section 860, et seq., California Code of Civil Procedure for in rem jurisdiction in such a validating proceeding.

4. Sonoma County Superior Court Action No. 84237 is also a validating proceeding. Action No. 84237 involves the validity of Ordinance No. 1791, which amended the redevelopment plan by closing streets and changing traffic patterns in Phase II to accommodate the proposed regional shopping center development of Ernest W. Hahn, Inc. Exhibit C to this complaint is a true copy of the Complaint for Injunction and Declaratory Relief in that action, the last pleading in the suit by plaintiff. Exhibit D is a true copy of the summons and proof of publication filed in connection with Action No. 84237.

5. Action No. 79762 and Action No. 84237 were consolidated for trial with two other actions filed by Codding Enterprises against the City of Santa Rosa and the Agency involving the downtown redevelopment project. The consolidated case was heard before the Honorable J. Hilary Cook on May 17-19, 1976. On July 28, 1976, Judge Cook filed his Notice of Intended Decision in that case, a true copy which is attached hereto as Exhibit E.

6. Codding Enterprises alleges in the First Cause of Action of the First Amended Complaint in Action No. 79762 that the contract between the Agency and Hahn is a sale of the shopping center site for less than adequate consideration as measured by the standards of 42 USC 1460(c) (4), the Urban Renewal Handbook of the Department of Housing and Urban Development ("HUD"), and Section 33433 of the California Health and Safety Code. The Sixth Cause of Action of the same pleading alleges that the contractual arrangements between Hahn and the Agency and the proposed

use of tax allocation financing for public costs of the project constitute a contract, conspiracy or combination in restraint of trade, a monopoly, an attempt to monopolize, and unfair competition. At the trial of the consolidated Superior Court actions, evidence was offered to the court on both causes of action, and the issues raised by them argued before the court.

7. On November 11, 1975, I attended the deposition in this action of Mr. Leevern Johnson, real estate specialist of HUD, which was noticed and taken by the attorneys for plaintiff. The review by HUD of the Hahn contract and the shopping center site appraisal of David Lane, M.A.I. was the principal subject of questioning at that deposition; Mr. Johnson testified he had conducted the review of that appraisal in connection with his official duties. At that deposition I informed Mr. Ricardo J.Hecht and William M. Brinton, counsel for the plaintiff, that the Agency would hold a noticed public hearing on December 1, 1975, to take final action upon the Hahn contract.

8. Exhibit F to this affidavit is a true copy of the Petition For Writ of Mandate And Injunctive Relief filed on September 27, 1974, on behalf of the City of Santa Rosa and the Urban Renewal Agency in Sonoma County Superior Court Action No. 78756. At the time of filing, the petitioners moved for a Preliminary Injunction and Peremptory Writ of Mandate to be heard on October 15, 1974. At the time of the hearing, the demurrer of the City of Rohnert Park was overruled and the City ordered to answer the petition. A true copy of the Answer is attached hereto as Exhibit G. The same order overruling the demurrer scheduled a

hearing on the merits for November 4, 1974. After the hearing on the merits the Court on December 9, 1974, issued its order denying the relief prayed for, and judgment was entered on December 24, 1974. A true copy of the Notice of Entry of Judgment is attached hereto as Exhibit H. The City of Santa Rosa and Urban Renewal Agency did not appeal the judgment, and it has been final and not subject to appeal since February, 1975.

9. The firm of which I am a member represented the City of Santa Rosa and/or the Agency in each of the suits listed on page 7 of the Brief submitted in support of this motion and each of the actions concluded as indicated therein.

10. The foregoing information is true of my own personal knowledge and if called as a witness I can competently testify thereto. This affidavit is submitted in support of the Motion for Summary Judgment and Motion to Dismiss of Defendants City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa.

DATED: August 18, 1976

RICHARD E. BRANDT

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

On August 18, 1976, before me, a Notary Public, personally appeared RICHARD E. BRANDT, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

JOANNE G. SNIDER

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
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555 Capitol Mall, Suite 950
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Telephone: (916) 444-3900
Attorneys for Defendants

United States District Court
Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

AFFIDAVIT OF JOSEPH E. COOMES, JR. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

JOSEPH E. COOMES, JR., being duly sworn, deposes and says:

1. I am an attorney at law and admitted to practice before the courts of the State of California and the United States Federal District for the Northern District of California. I am one of the attorneys for defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa in this action.

2. On April 30, 1975, I attended the deposition of Peter M. Callinan, city manager of plaintiff City of Rohnert Park, and conducted the examination of the

witness. My questions and the answers of Mr. Callinan were taken down by Mr. Robert V. Maes, a Notary Public, who thereafter transcribed the same into typewriting. The partial transcript attached to this affidavit as Exhibit A (pp. 33-37 and pp. 39-40) accurately reflects my questions to Mr. Callinan and his answers concerning the land in Rohnert Park designated for regional shopping center use.

On May 21, 1975, I attended another session of the continued deposition of Mr. Peter Callinan and conducted the examination of the witness. My questions and Mr. Callinan's answers were again taken down by Mr. Robert V. Maes, Notary Public, who thereafter transcribed the same into typewritten form. Exhibit B to this affidavit is a partial transcript of that deposition (pp. 8-9) which accurately reflects my questions and Mr. Callinan's answers concerning attorneys' fees paid by Rohnert Park.

3. On July 2, 1975, I attended the deposition of Arthur F. Hollingsworth, Jr., former president of the Rohnert Park Chamber of Commerce, and personally conducted examination of the witness. My questions and the answers of Mr. Hollingsworth were taken down by Mr. Robert V. Maes, Notary Public, who thereafter transcribed the same into typewritten form. The partial transcript (pp. 31-33) attached to this affidavit as Exhibit C accurately reflects my questions and the answers of Mr. Hollingsworth concerning funds collected from Codding Enterprises and donated to the City of Rohnert Park for attorneys' fees.

4. As special counsel to the Urban Renewal Agency, I have been involved during the past two years in discussions and negotiations concerning the financing of the local public costs of the downtown Santa Rosa redevelopment project. The only feasible permanent source of funds to pay such costs are bonds issued by the Agency, the repayment of which is based on the increase of property taxes and revenues that will result from the development of the property. This method of financing is expressly authorized by the State Constitution and Community Redevelopment Law and is referred to as tax allocation financing.

5. Bond counsel and financial consultants for the Agency have advised me that the pendency of the instant lawsuits effectively prevents the Agency from issuing any bonds secured by the pledge of taxes from the proposed development of the Phase II and Phase III project areas, even though the Agency is not legally enjoined or restrained from issuing said bonds. The Agency's bond counsel, Orrick, Herrington, Rowley and Sutcliffe, have advised me that as long as the instant lawsuits are pending, they would not be able to issue an unqualified opinion that bonds of the Agency secured by the pledge of taxes from the proposed development of the Phase II and Phase III project areas would be valid and enforceable. The Agency's financial consultant, Blyth, Eastman, Dillon, Inc., has advised me that such Agency bonds would not be marketable and could not be sold without such an unqualified opinion of bond counsel.

6. The foregoing matters are true of my own personal knowledge, and, if called as a witness, I can competently testify they are true. This affidavit is submitted in support of the motion for summary judgment

and dismissal of defendants, City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa.

DATED: August 18, 1976

JOSEPH E. COOMES, JR.

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

On August 18, 1976, before me, a Notary Public, personally appeared JOSEPH E. COOMES, JR., known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

JOANNE G. SNIDER

EXHIBIT A

MR. COOMES: Mr. Callinan, referring to Defendant's Exhibit B will you identify and refer to the property indicated as regional commercial and owned by Codding Enterprises?

MR. HECHT: I am going to object to the form of the question. What property Codding Enterprises owns, the best evidence is the Assessor's map rather than Mr. Callinan's testimony.

MR. COOMES: The question is preliminarily leading into some questions about the zoning applications and Mr. Callinan is aware of the property that was covered by that rezoning application.

Maybe I can rephrase the question.

MR. HECHT: If you would be so kind.

MR. COOMES: Mr. Callinan, at the time of the adoption of the General Plan in 1966, was the area that's designated "regional shopping center" zoned regional shopping center?

A No.

Q And at some time subsequent to that did the City of Rohnert Park consider and act upon the rezoning of the property in that area to regional shopping center zoning?

A Yes.

Q And was one of the applicants Codding Enterprises?

A Yes.

Q And are you familiar with the area owned by Codding Enterprises?

A Yes.

Q In reference to Defendant's Exhibit B, would you identify the property owned by Codding Enterprises that has been rezoned to regional commercial?

A It's the area generally to the immediate west of the freeway interchange shown on the map being the areas between South Santa Rosa Avenue or the frontage road and the freeway. And also the area to the southwest of the interchange being generally south of Rohnert Park Expressway.

MR. HECHT: Mr. Coomes, I am going to permit Mr. Callinan to testify and answer your questions as you ask them subject to stipulation that we will correct his testimony by checking with the Assessor's maps as to who owns what. I think that would be the best evidence.

MR COOMES: Very well.

Mr. Callinan, is there any other property in the City of Rohnert Park designated as regional commercial other than the property shown in the area adjacent to the freeway interchange and Rohnert Park Express-

way?

A No

Q Now, of this area shown on Exhibit B, is there a commercial development presently in place?

A Yes.

Q And could you describe the general location of that commercial development?

A On the east side of the freeway there was existing in the area north of the exressway, south of the creek, an Exchange Bank development, a Big 4 rental facility. South of the expressway on the east side there is a park plaza shopping center. There is also a Texaco Service Station on Commerce Boulevard. There is a self-service furniture facility and the Forsythe Clyde Real Estate Office and other offices in that building. On the west side of the freeway there is the Regional 8 Motel, I believe its name is. There is the Stevens Restaurant and across the street from that there is the Monastery Furniture Factory.

Off hand I think that's all of the commercial developments in the immediate area of the interchange between the two creeks shown on the General Plan map.

MR. HECHT: May we go off the record a moment?

MR. COMMES: Yes, off the record.

(Whereupon, counsel recessed the deposition briefly and conferred off the record.)

MR. COOMES: Mr. Callinan, for the convenience of counsel, would you mark the compass points on Exhibits A and B?

A Okay. North is as shown in the symbol and south of Exhibit B. East would be to the right looking at the map. West to the left and south towards the bottom of

the map. On Exhibit A the North symbol is shown on the left, the lower left hand corner of the map.North being toward the top of the map. South would best be toward the bottom of the map. East would be toward the right hand portion of the map and west toward the left hand portion.

MR. BRINTON: Just out of curiosity, Mr. Callinan, do you know if this is true or magnetic north?

A I have no idea.

MR. COOMES: Mr. Callinan, referring again to Exhibit B, does the City of Rohnert Park own property within the area shown as regional commercial?

A Yes.

Q And could you generally indicate the location of the City's property?

A In the area we have a two and a half acre corporation yard that is immediately adjacent to the rail road and the symbol which is — if I can find the symbol, the little symbols there with the triangle and small dot in the circle identified as corporation yard in addition in the solid red area we hold title to a library site, a proposed library site. We also own some right of way.

Q Would you indicate the proposed library site generally?

A Generally it would be on the north side of the road that extends eastward from Commerce Boulevard and it's in actuality is approximately 27,000 square feet and that's immediately south of the TGY store of the park plaza shopping center.

Q You mentioned street right of ways, does the City own any other property in that area?

A No, not inside the commercially designated area.

Q By commercially designated area you are referring to the area in solid red?

A That would be solid red for the checkered area.

Q Mr. Callinan, have you read the complaint filed by the City of Rohnert Park?

A Some time ago.

Q I'm not going to ask you specifically about the allegations in this complaint, but I do want to ask some questions to clarify some things in that complaint.

Does the City of Rohnert Park own any property in the City of Santa Rosa?

A No.

Q And therefore the City of Rohnert Park does not own any property in the project area of Santa Rosa Center Redevelopment Project?

A No.

Q Okay. You own no property?

A That's correct.

Q Does the City of Rohnert Park pay any taxes to the City of Santa Rosa?

A The City of Rohnert Park as a political subdivision you mean?

Q Yes.

A No, we are tax exempt.

Q Well, not necessarily if you own property outside your City.

Does the City of Rohnert Park pay any taxes to the United States Government?

A If you could define taxes, we pay for a example social security taxes through the State.

Q You pay employee taxes, do you pay excise taxes?

A No.

Q Franchise taxes?

A No.

Q Income taxes?

A Not yet, no.

Q Do you have — does the City of Rohnert Park have any financial obligations that would be increased by the development of a shopping center in downtown Santa Rosa?

A Increased?

Q Yes, financial obligations?

A The City doesn't but its residents do.

A No.

Q Does the City of Rohnert Park own any land which is zoned for commercial use in the City of Rohnert Park?

A Yes.

Q Zoned for commercial uses?

A Yes.

Q And what is that, some property you previously referred to in your testimony?

A Yes.

Q And what property was that?

A The 27,000 square feet of property that we recently proposed as the library site.

Q Is that property — has that property been removed from the tax roll as public property?

A I think we sent in a request to have it removed but I don't know that it has been removed.

Q Either has been or will be removed; is that correct?

A Yes.

Q Does the City of Rohnert Park own any land that is available for use for commercial enterprises?

A Yes.

Q What property is that?

A That's the land that we own north of Hinebaugh Creek on South Santa Rosa Avenue.

Q How did the City acquire that property?

A We purchased it from — I believe it was the Rohnert Park Industrial Development Company.

Q And is the property being held for public use?

A We bought it in anticipation of needing it for expansion of our waste water treatment facility.

Q And that property as shown on the Exhibit B, is designated for utility use; is that correct.

A That's correct.

Q Is the property presently being devoted to any private commercial use?

A No.

Q And is the property tax exempt?

A Yes.

Q By reason of its ownership by the City of Rohnert Park?

A Yes.

Q Is the property available for private commercial use?

A It could be.

Q Do you mean the City would consider leasing or selling that property?

A Subject to the City Council agreeing, yes.

Q Would that be compatible with the public use for which the property is being held?

A Yes, because since we have acquired it we have entered into an agreement with Santa Rosa for the treatment of our waste water. So this land will no longer be required for the purpose that we originally obtained it.

Q Is the City of Rohnert Park involved directly or indirectly in efforts to finance commercial development in the City?

A If you could define "indirectly?"

Q Is the City involved directly in efforts to finance commercial —

EXHIBIT B

to be in this article? I presume they mean the Council because they mentioned my name in the previous paragraph.

Q It is clearly referring to other City officials of the City of Rohnert Park. Are there other City officials other than members of the Council who would have knowledge of matters such as this?

A Oh, what the contributions from the Chamber?

Q Yes, yes?

A I certainly have knowledge. Finance Officer has knowledge our attorneys —

MR. HECHT: City officials.

THE WITNESS: Oh, that's right. City officials. I guess that would be it unless you count the Clerk in as a City official.

Q Do you have knowledge that some of the contributions made by the Chamber of Commerce of the City of Rohnert Park have come from developers with fi-

nancial interest in the project?

A I was misreading this thing. I have knowledge and our Financial Officer has knowledge that we received contributions from the Chamber of Commerce. I've heard and have been advised that the Chamber has received some contributions from developers but I have no direct knowledge of that.

Q From developers with property in the area zoned for regional shopping center?

A Yes. Developers whose interest appears to be mutual with the City of Rohnert Park.

Q You have stated that this suit so far has cost approximately $19,000 which in itself entirely has been paid by contributions collected by the Rohnert Park —

MR. HECHT: Excuse me, I don't recall, Mr. Coomes, that Mr. Callinan has stated that suit has cost $19,000 to date.

MR. COOMES: Okay. Mr. Callinan, referring to the paragraph first quoted to you, that the suit so far has cost approximately $19,000. Is that an accurate statement?

A Yes.

Q And is it further an accurate statement that the entire fee has been paid by contributions collected by the City's Chamber of Commerce?

A I believe that we have collected that much from the Chamber.

Q Given the fact that other persons have contributed to costs of this lawsuit does the City of Rohnert Park recognize an obligation to consult with these other parties?

MR. HECHT: I'm going to object to that question. It calls for an opinion and conclusion of the witness and it also calls for heresay evidence.

MR. COOMES: Mr. Callinan, did you consult with any other parties concerning the matter of dropping the lawsuit?

A No. May I talk to my Counsel?

MR. COOMES: Yes.

(Off the record discussion)

MR. COOMES: Back on the record. Well, did you discuss —

THE WITNESS: I discussed it with a lot of people.

Q After the May 5 Council Meeting?

A Yes.

EXHIBIT C

listed on this special events and under the so-called monthly financial report for the Rohnert Park Chamber of Commerce.

MR. ANDRIAN: Answer the question.

THE WITNESS: Answer it, I have forgotten what the question was?

MR. COOMES: The question is did the contribution from Codding Enterprises and Cofego in the amount of $5,000 in fact come into the Rohnert Park Chamber of Commerce?

THE WITNESS: Should I answer the question?

MR. ANDRIAN: Yes.

THE WITNESS: Yes.

MR. COOMES: Is that contribution referred to in the monthly financial report for April, May, 1975?

A Yes.

Q And would you indicate where that is referred to?

A Where?

Q Yes?

A Under Current Income, Item C, Special Events No. 1, 2 and 3.

Q Did any other contributions come in to the Rohnert Park Chamber of Commerce from Codding Enterprises for purposes of the lawsuit?

A This is off the record so I can clarify the question. Other than what you have indicated here?

Q Other than the $5,000 total just referred to, did any other contributions come in from Codding Enterprises?

A Yes.

Q And in what amount was that contribution?

A $14,000.

Q And is that referred to on the Monthly Financial Report?

A It is.

Q Exhibit 5?

A Yes.

Q Would you identify where that reference is, please?

A That is this part.

MR. HECHT: Go ahead.

THE WITNESS: I can't without seeing that.

Q I've got another copy.

A That's all right. It is under Current Income Special Events, line 3.

Q Referring again to Exhibit 5, the Monthly Financial Report. The $19,000 shown then is current income, represents 3 contributions from Codding Enterprises and Codding Enterprises on behalf of Cofego for purposes of this lawsuit, financing this lawsuit, is that correct?

A That's correct.

Q Do you know when this financial statement was prepared?

A I don't recall. As I say, it was sporadic.

Q Subsequent to its purported date, April, May, 1975, have any additional contributions been received by the Rohnert Park Chamber of Commerce from Codding Enterprises or Cofego Enterprises?

A No, none that I'm aware of.

Q Now I will ask you to refer to these other exhibits. Exhbits 8, 9 and 10. Exhibit 8, a Deposit Receipt in the amount of $14,000; Exhibit 9, a Deposit Receipt in the amount of $2,500. Exhibit 10, a Deposit Receipt in the amount of $2,500. Are those deposit receipts for the deposits by the Chamber of Commerce of Rohnert Park into its banking account of the contributions received from Codding Enterprises and Cofego which are referred to in this monthly financial report and in your testimony?

A To the best of my knowledge.

MR HECHT: Let me ask you a question, Mr. Hollingsworth. Did you attend to the depositing of that money?

THE WITNESS: Excuse me?

MR. HECHT: Did you go to the bank —

THE WITNESS: No, I didn't deposit the funds. I didn't make the deposits.

MR. COOMES: Who has general supervision over

the performance of clerical personnel in the office of the Chamber of Commerce, Mr. Hollingsworth?

A I do.

Q You did as President?

A That's correct.

Q Were these funds deposited into the general account of the Chamber of Commerce?

MR. HECHT: I'm going to object to that in addition to the grounds of relevancy, on the grounds of lack of foundation and calling for an opinion and conclusion of the witness.

MR. ANDRIAN: I join. There has been no foundation such showing that he went to the bank or that he deposited —

MR. COOMES: You supervised the — strike that question.

You know who deposited these funds on behalf of the Chamber of Commerce?

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In The United States District Court
For The Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

AFFIDAVIT OF JULIAN A. FITZHUGH
IN SUPPORT OF FEDERAL DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

JULIAN A. FITZHUGH, being duly sworn, deposes and says:

1. I am a Program Manager with the San Francisco Area Office, U.S. Department of Housing and Urban Development (hereinafter HUD), 1 Embarcadero Center, Suite 1700, San Francisco, California. I am presently and have been since September 1970 Program Manager for the jurisdiction of Program Area B which includes Santa Rosa, California.

2. As Program Manager, my duties include primary

responsibility for HUD's federally assisted programs in the City of Santa Rosa. The Santa Rosa Center Project, Phase II, is a federally-assisted Urban Renewal Project which received $16,847,609 in loan assistance and $12,527,017 in grant funds. The City has allocated $550,000 in Community Development block grant funds to Phase III.

3. The records of the San Francisco Area Office establish that the Santa Rosa Center Urban Renewal Plan was adopted by the Santa Rosa Redevelopment Agency on August 14, 1961 and adopted by the City Council of Santa Rosa on December 5, 1961 and approved by the Housing and Home Finance Agency (predecessor agency to the U.S. Department of HUD) on January 15, 1962.

The first amendment to the plan was approved by the Housing and Home Finance Agency on January 14, 1964 and the second amendment to the plan was approved by HUD on July 1, 1965.

The third amendment to the plan was adopted by the Santa Rosa Redevelopment Agency on March 3, 1970 and adopted by the City Council of Santa Rosa on March 10, 1970.

4. On May 25, 1970, HUD approved the third amendment to the Plan. The purpose of the amendment was to increase the project area by 31.2 acres. The addition was necessitated by an earthquake that resulted in structural damage causing blighted and deteriorated conditions in an additional downtown area. This condition warranted renewal treatment to protect the area already being renewed from being adversely affected by the spread of blight to the surrounding area and to aid downtown Santa Rosa in recovering from the damage done by the earthquake.

5. The Housing and Home Finance Agency (predecessor agency to U.S. Department of HUD) allocated $171,049 to the Santa Rosa Redevelopment Agency, a local public agency of the City of Santa Rosa duly organized and empowered under the California Community Redevelopment Law (California Health and Safety Code, Sections 33000 et seq.) to undertake planning activities in the downtown area of Santa Rosa. This allocation order was subsequently amended on March 6, 1962 to increase the amount by $19,849 for a total of $190,898 for the purpose of completing a final redevelopment plan and a loan and grant application.

6. On March 9, 1962 the Housing and Home Finance Agency (predecessor agency to the U.S. Department of Housing and Urban Development) received Part I Application for Loan and Grant from the Santa Rosa Redevelopment Agency to carry out urban renewal activities in the Santa Rosa Center Project Area under the provisions of Title I of the Housing Act of 1949, as amended. On June 6, 1962 a Loan and Grant Contract was entered into between the Santa Rosa Redevelopment Agency and the Housing and Home Finance Agency (predecessor agency to the U.S. Department of Housing and Urban Development) which authorized the start of project execution activities in 39.9 acres of downtown Santa Rosa. The Contract provided for a Federal Loan in the amount of $4,922,616 and a Federal Project Grant to $2,625,023. Said Contract has since been amended ten times on the following dates

and for the following purposes:

1st Amendatory Loan and Grant Contract — executed June 18, 1963, and increased the total grant to $2,694,263 and the total loan to $4,957,945.

2nd Amendatory Loan and Grant Contract — executed February 7, 1964, increased the total loan grant to $3,184,594 and the total loan to $5,450,497.

3rd Amendatory Loan and Grant Contract — executed October 18, 1963 decreased the total grant to $3,161,108 and increased the total loan amount to $5,778,721.

4th Amendatory Loan and Grant Contract — executed May 10, 1967, increased the toal Federal Grant to $3,333,329, and the loan to $5,908,880.

5th Amendatory Loan and Grant Contract — executed June 9, 1970, did not change loan or grant amount. The amendment changed the allowable interest rate under the contract terms.

6th Amendatory Loan and Grant Contract — executed September 14, 1970, increased total grant to $8,318,497 and increased the Project temporary loan to $13,223,939. The purpose of this amendment was to provide for redevelopment of an additional 31.2 acres.

7th Amendatory Loan and Grant Contract — executed September 20, 1972, increased the total grant by $1,553,370, for a total grant of $10,436,717, and increased the project temporary loan by $1,533,370 for a total loan of $14,757,309. The purpose of the amendment was to provide for

increased costs of project activities and did not provide for an increase in the project area.

8th Amendatory Loan and Grant Contract — executed November 27, 1973, increased the total grant by $1,800,000 for a total grant of $12,236,717 and increased the project temporary loan by $1,800,000 for a total loan of $16,557,309. The purpose of the amendment was to provide for increased costs of project activities and did not provide for an increase in the project area.

9th Amendatory Loan and Grant Contract — executed August 2, 1974 increased the total grant to $12,527,017 and increase the project temporary loan to $16,847,609.

10th Amendatory Loan and Grant Contract — did not change loan and grant amount but was an agreement by the Redevelopment Agency that it would take no action which would have an impact on historical structures in the Renewal Area without approval from HUD.

7. I stated in an affidavit of May 3, 1964 prepared for the suit of *Codding Enterprises* v. *Lynn*, Civil No. C-74-0802 SAW, U.S. District Court, Northern District of California, that the Department of HUD will not approve any further land disposition contracts for the Phase II area of the Santa Rosa project until an Environmental Impact Statement had been prepared in accordance with the National Environmental Policy Act.

8. On July 22, 1975, a final Environmental Impact Statement (EIS) was issued by the Department of HUD for the Santa Rosa Center Project. As set forth in

the distribution list attached to the final EIS, a copy of the final EIS was sent to Peter Callinan, City Manager, City of Rohnert Park, and to the law firm of Cotton, Seligmun and Ray, attorneys for Plaintiff in the subject lawsuit.

9. The Santa Rosa Redevelopment Agency requested a concurrence by HUD in the form of the Disposition Agreement with Earnest Hahn, Inc. on November 14, 1974 and in the disposition price on October 31, 1975 for the 21 acres in the Phase II area of the Santa Rosa Center Project. HUD is not a party to the Disposition Agreement or to any previous agreement between the developer Earnest Hahn, Inc. and the Redevelopment Agency. HUD reviews the form of the Disposition Agreement to insure that it contains required HUD provisions (e.g. the land contains an anti-discrimination covenant; the developer agrees not to resell the land; when title to the land passes, the proceeds will be immediately transferred to HUD into the Temporary Loan Repayment Fund). HUD concurs in the disposition price to insure the property was disposed of at its fair reuse value since proceeds from the land are to be used to retire outstanding federal loans.

10. By letter of November 7, 1975, HUD Director, Community Planning and Development Division, informed James K. Burns, Executive Director, Santa Rosa Community Development Commission that the Development Commission could proceed to dispose of the Phase II parcel at a minimum price of $2,000,000. Mr. Tedesco informed Mr. Burns that HUD had reviewed the provisions of the proposed disposition agreement for administrative and legal acceptability

and had no objection to its execution by the parties.

11. HUD was not requested to approve the disposition price for the Phase III area of the Santa Rosa Center Project since the $550,000 of Federal funds used were Community Development block grant funds and there is no requirement that land be disposed of at fair reuse value. Block Grant funds is grant not loan money; therefore, any proceeds from the land do not retire outstanding Federal loan obligations.

Date:

JULIAN A. FITZHUGH
Program Manager
San Francisco Area Office
Department of Housing and
Urban Development

Subscribed and sworn to before me this date: August 20, 1976

EUGENIA J. WILDFONG
Notary Public

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In The United States District Court
For The Northern District of California
Civil Action No. 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

AFFIDAVIT OF LEEVERN JOHNSON
IN SUPPORT OF FEDERAL DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

LEEVERN JOHNSON, being duly sworn, deposes and says:

1. I am a Realty Specialist with the San Francisco Area Office of the Department of Housing and Urban Development (hereinafter HUD). As Realty Specialist, my responsibilities include reviewing land acquisition and disposition appraisals in all HUD programs within the jurisdictional area of the San Francisco Area Office and determining whether the appraisals were done in accordance with HUD standards.

2. The San Francisco Area Office received land disposition appraisals for the Santa Rosa Center Project for 21 acres in Phase II of the project area which is to be used for a regional shopping center and was cleared with Federal Urban Renewal Loan and Grant Assistance. The following appraisals were received by HUD: Conger and Fisk dated January 10, 1972, Richard U. Ratliff dated November 15, 1972; Myers and Neithammer, dated April 3, 1970. A review of these appraisals was done by David L. Lane in June 1973, Real Estate Appraiser of Sacramento, California. In addition, Mr. Lane did an updated appraisal on October 1, 1975, which appraisal valued the subject property at $2.00 per square foot with a total value for the total 21 acres of $1,829,520.

3. I reviewed the October 1, 1975 appraisal of David Lane and the April 3, 1970 appraisal of Myers and Neithammer and found them to be in accordance with HUD requirements. Mr. Hugo Countanden, a former HUD Realty Specialist, had previously reviewed the Conger and Fisk, Ratliff, and Myers and Neithammer appraisals. Since proceeds from the sale of the land are to be used to retire outstanding Federal loans on the subject property, Title I of the Housing Act of 1949, Section 110(c)(4) provides that any property disposed of in the urban renewal area be at its fair value for uses in accordance with the urban renewal plan. Urban Renewal Handbook 7214.1; Chapter 3, page 9 states: "The fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land uses to be imposed on the redeveloper by the Urban Renewal Plan."

4. Based upon a review of the reuse appraisals and a

field review of the subject property, I recommended that the requested price of $2,000,000 for the Phase II land of approximately 21 acres be approved. In arriving at this recommendation, I field reviewed comparable sales listed in the appraisals, smaller shopping areas which could in competition with the proposed shopping center, and smaller parcel sales listed by the reuse appraiser.

Date: August 20, 1976

LEEVERN JOHNSON
Realty Specialist
San Francisco Area Office
Department of Housing and
Urban Development

Subscribed and sworn to before
me this date: August 20, 1976

PAUL DEMARE
Notary Public

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Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
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PLAINTIFF'S BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

	Page
I Statement of the Case	1
II Arguments	22

TABLE OF AUTHORITIES

Cases

Alabama Power Co. v. Alabama Electric Cooperative, 394 F. 2d 672 (5 Cir. 1968)	24
American Federal of Tobacco Growers v. Neal, 183 F. 2d 869, 871-872 (4 Cir. 1950)	3
Baker v. F & F Investment, 480 F.2d 829 (7 Cir. 1973)	23
Barlow v. Collins, 397 U.S. 159, 25 L.Ed. 192 (1970)	22

Burton v. Wilmington Parking Authority 365 U.S. 715, 6 L.Ed. 45 (1961) 16

Brachter v. Akron Board of Realtors, 381 F.2d 723 (6 Cir. 1967) 3

Cady v. Morton, 527 F.2d 786 (9 Cir. 1975) 22,24

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 51 L.Ed. 240 (1906) 6

City of Lafayette, La. v. Louisiana Power & Light Co., 532 F.2d 431 (5 Cir. 1976) 21

City of Lansoure v. Lasell, 26 N.D. 638, 145 N.W. 577 (1914) 5

City of Saginaw v. Consumers Power Co. (Mich.) 182 N.W. 146 (1921) 5

City of Saint Mary's v. Hope Natural Gas Co., 71 W.Va. 76, 76 S.E. 841 (1913) 5

City of San Joaquin v. State Board of Equalization, 9C.A.3d 365, 88 Cal. Reptr. 12 (1970) 5

City of Seattle v. Stirrat, 55 Wash. 560, 104 Pac. 834 (1909) 5

Contract Buyers League v. F & F Investment, 300 F.Supp. 210 (D.C. Ill. 1969) 22

County of Santa Clara v. Curtner, 245 C.A.2d 730, 54 Cal.Rptr. 257 (1966) — Fn.46 17

Darnell v. Markwood, 220 F.2d 374 (D.C. Cir. 1954) ... 3

Data Processing Service v. Camp, 397 U.S. 150 25 L.Ed. 184 (1970) 21

Foeller v. Housing Authority of Portland, 198 Ore. 205, 256 P.2d 752 (1953) 7

Garrett v. City of Hamtramck, 335 F.Supp. 16 (D.C. Mich. 1971) 14

Gatreaux v. Romney, 448 F.2d 731 (7 Cir. 1971) 16

Gibson & Perrin Co. v. City of Cincinnati, 480 F.2d 936 (6 Cir. 1973) — Fn. 45 16

Golstein v. C.I.R., 298 F.2d 562 (9 Cir. 1962) 14

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) 23

Holonak v. Avco Corp., etc., 514 F.2d 285 (2 Cir. 1975). 16

Hospital Building Co. v. Rex Hospital Trustees, ___ U.S. ___, 48 L.Ed.2d 341 (1976) 2

Juneau Square Corp. v. First Wisconsin National Bank, 60 F.R.D. 46 (D.C. Wis. 1973) 3

Muncie National Gas Co. v. City of Muncie, 160 Ind. 97, 66 N.E. 436 (1903) 5

N.A.A.C.P., etc. v. Hills, 412 F.Supp. 102 (D.C. Calif. 1976) — Fn. 22 9

Rogers v. Douglas Tobacco Board of Trade, Inc. 266 F.2d 636 (5 Cir. 1959) cert den 361 U.S. 833, 4 L.Ed.2d 75 3

State of California v. Automobile Manufacturers Association, Inc., 481 F.2d 122 (9 Cir. 1973) 6,23

State of Washington, v. Automobile Manufacturers Association, 538 F.2d 231 (9 Cir. 1976) 1,6,23

Tripp v. C.I.R., 337 F.2d 432 (7 Cir. 1964) 14

United States v. Certain Land In Borough of Brooklyn, etc., 346 F.2d 690 (2 Cir. 1965) 14

United States v. Williams, 447 F.2d 1285 (5 Cir. 1971 — Fn. 39) 13

Statutes

Administrative Procedure Act 22

15 U.S.C. 26, Clayton Act 1,6

Housing Act of 1949 (42 U.S.C. 1441) 7,16,17

Improvement Bond Acts of 1911, 1915 4,5

15 U.S.C. 1, 2, Sherman Act 1,6,19,24

49 U.S.C. 1460(a) (b) (c) (4) 7

Texts

56 AmJur.2d, Municipal Corps., Sec. 16 5

25 Cal.Jur.2d, Highways & Streets, Sec. 330 5

64 C.J.S., Municipal Corps., Sec. 2186 4

Sec. 2190 5

McQuillen, Municipal Corporations, Sec. 49.57, pp. 302-303 5

HUD's Urban Renewal Handbook 7,8

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Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

I

STATEMENT OF THE CASE

The Plaintiff in this suit is the City of Rohnert Park, a California municipal corporation, located in Sonoma County. The purpose of the suit is to enjoin the continuance by defendants of a "current ongoing conspiracy" prohibited by the Sherman Act (15 U.S.C. 1, 2). This conspiracy threatens "loss or damage" to Plaintiff and to some of its inhabitants, property owners and taxpayers. Therefore, Plaintiff is "entitled to sue for and have injunctive relief" in this Court pursuant to Section 16 of the Clayton Act (15 U.S.C. 26), in harmony with the teaching of the Court of Appeals for this

Circuit in *State of Washington* v. *Automobile Manufacturers Association,* 538 F.2d 231, 235, 237 (9 Cir. 1976).

The objective of the conspiracy is to monopolize a substantial portion of the new general retail merchandise space needed to supply the existing and future demand therefor in the Santa Rosa Trade Area.[1]

To achieve this objective defendants have effectively forestalled the development and construction of commercial facilities including a regional shopping center on a site within Plaintiff's boundaries. These facilities as planned were capable of supplying the then existing demand for such space in the Trade Area.[2]

Defendants forestalled the construction of these commercial facilities by a threat to build a competing regional shopping center on a *unique* site with *unique* advantages in the downtown section of the City of Santa Rosa.[3] This center as conceived by defendants will contain at least seven hundred thousand (700,000) square feet of retail space, which is enough to supply the estimated demand for such space in the area *until 1990.*[4] The construction of this center and the acquisition of the site on which it will stand is to be financed primarily by a massive illegal *subsidy* from the federal government.[5]

---

[1] In the context of this case, the term "new general retail merchandise space" has the same meaning as the terms "new department store space" and "commercial space."

[2] It has been estimated that 400,000 square feet would be required to meet the demand by 1975 (Hahn Depo., Ex. 24, p. 14).

[3] Depo. Hahn, Ex. 24, pp. 2-5; Depo. Egan, pp. 50-51.

[4] Final Environmental Impact Statement, Santa Rosa Center (Calif. R-45) (F.E.I.S.), Daugherty Depo., Ex. 1, pp. 114-115.

[5] This subsidy was brought to the attention of the defendant Secretary of HUD on or about 10-29-73 (Depo. Sachs, Ex. 2, pp. 1-3).

What has been said makes it apparent under precedents established in cases involving similar circumstances that defendants have embarked on a conspiracy that is cognizable under the Sherman Act (*Hospital Building Co.* v. *Rex Hospital Trustees,* _____ U.S. _____, 48 L.Ed.2d 341, 342 (1976), a conspiracy to block the expansion and relocation of a hospital; *Juneau Square Corp.* v. *First Wisconsin National Bank,* 60 F.R.D. 46, 47-48 (D.C. Wis. 1973), a conspiracy to monopolize the commercial rental market of downtown Milwaukee; *Brachter* v. *Akron Board of Realtors,* 381 F.2d 723, 724 (6 Cir. 1967), a conspiracy to prevent negroes from owning or renting property in white neighborhoods in Akron; *Rogers* v. *Douglas Tobacco Board of Trade, Inc.,* 266 F.2d 636, 643-644 (5 Cir. 1959) cert. den. 361 U.S. 833, 4 L.Ed.2d 75, a conspiracy unduly to limit the use of tobacco warehouses; *Darnell* v. *Markwood,* 220 F.2d 374, 376 (D.C. Cir. 1954), a conspiracy to monopolize the suitable and desirable office space in the District of Columbia; *American Federation of Tobacco Growers* v. *Neal,* 183 F.2d 869, 871-872 (4 Cir. 1950), a conspiracy to exclude a tobacco warehouse from access to the tobacco market).[6]

Moreover, this conspiracy threatens "loss or damage" to Plaintiff, its taxpayers and particularly some of its property owners. To realize this we can begin by considering the *undisputed* proposition that the shopping center conceived and sponsored by defendants "should be able to absorb the needed growth for com-

---

[6] These cases teach that *local* business restraints can produce effects proscribed by the Sherman Act.

mercial space in Santa Rosa *until about 1990*,"[7] and that *as* there is "not a large enough market to support two major shopping areas," the one built "on the less desirable site would suffer and perhaps fail."[8] It must therefore be conceded and concluded from a consideration of this proposition that it would be foolhardy to build within the foreseeable future commercial facilities inside Plaintiff's boundaries, and that those of its property owners who have invested to develop a site for such facilities will, unless the conspiracy is enjoined, most assuredly lose their investment. With respect to this, it should *not* be overlooked that this result will be achieved through an illegal subsidy and the deliberate creation of *excess* capacity.

The site designated for commercial facilities in which these property owners made their investment consists of approximately forty-five (45) assessor's parcels owned and assessed to seventeen (17) persons or entities.[9] Plaintiff also owns property in this site and this property is either available for commercial uses "or is zoned for commercial uses."[10]

Over a period of approximately twenty (20) years, in excess of a million dollars ($1,000,000) was spent under Plaintiff's direction for street construction, sewers, drainage, water mains and other improvements necessary to render the site suitable for commercial development. Most of the funds required to defray the cost of these improvements were raised by special as-

[7] All emphasis added to quoted material is ours, unless otherwise indicated.
[8] F.E.I.S., supra, pp. 114, 125.
[9] R.L. Brust Affidavit, Exhibit A.
[10] Callinan Depo., Vol. 1, pp. 39-40.

sessments levied on the several owners of the property, and this was done pursuant to the Improvement Bond Acts of 1911 and 1915.[11] Altogether these assessments aggregated the sum of approximately one million thirty thousand dollars ($1,030,000).[12]

All this clearly indicates that in developing this land Plaintiff has been acting as the representative or agent of almost a score of property owners and this leads to the conclusion that it has "*standing*" to sue on their behalf (64 C.J.S., Municipal Corporations, Sec. 2186, pp. 1030-1031). This conclusion also finds support in other circumstances present in this case.

The bonds issued to raise the money used for the improvements are by virtue of the provisions of the Improvement Acts of 1911 and 1915 payable exclusively from a *fund* created by the payment of the special assessments levied on the owners and their respective properties, and Plaintiff as well as any other issuer similarly situated is not liable for their payment (25 Cal.Jur.2d, Highways and Streets, Sec. 330, pp. 237-238). This is consistent with the generally accepted notion that when a city engages in the construction of improvements for the benefit of private property it is acting primarily in its *proprietary* capacity, and that money raised and disbursed for the purpose is not "public money," but constitutes "trust funds" held and spent by the city for the benefit of the individual owner [*City of Seattle* v. *Stirrat*, 55 Wash. 560, 104 Pac. 834, 836-837 (1909)]. We submit, therefore, that Plain-

[11] Callinan Depo., Vol. 1, pp. 40-43; Vol. ii, p. 39.
[12] R.L. Brust Affidavit, Exhibit A.

tiff in its capacity as *agent, representative* and *trustee* of its property owners, and as custodian and guardian of the collective rights of its inhabitants, has *standing* to bring this equitable suit to enjoin defendants' unlawful conduct thereby rendering unnecessary a *multiplicity* of such suits (*Muncie National Gas Co.* v. *City of Muncie,* 160 Ind. 97, 66 N.E. 436, 441 (1903); *City of Saint Mary's* v. *Hope Natural Gas Co.,* 71 W.Va. 76, 76 S.E. 841 (1913); *City of Lansoure* v. *Lasell,* 26 N.D. 638, 145 N.W. 577, 578 (1914); *City of Saginaw* v. *Consumers Power Co.* (Mich.) 182 N.W. 146, 154 (1921); 64 C.J.S., Municipal Corporations, Sec. 2190, p. 1032; 56 Am.Jur.2d, Municipal Corporations, Etc., Sec. 16, pp. 81-82; McQuillen, Municipal Corporations, Sec. 49.57, pp. 302-303).

Moreover, the interests of Plaintiff and its inhabitants coincide harmoniously with those of its property owners. Consideration of the nature and administration of the California retail sales tax [*City of San Joaquin* v. *State Board of Equalization* 9 C.A.3d 365, 370-371, 88 Cal.Reptr. 12 (1970)] makes it evident that a heavy concentration of retail merchandising business in Santa Rosa will enhance the retail sales tax revenues of that city, while diminishing those to which Plaintiff might otherwise be entitled, and as a consequence Plaintiff is threatened by the conduct of defendants with a loss of revenues which it could use either directly or indirectly for the benefit or relief of its inhabitants. Also Plaintiff is the proprietor of property within its commercial area which is likewise threatened with financial loss should defendants' scheme succeed. Accordingly, in this case, as in other

cases involving cities, and the antitrust statutes [*Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 395-396, 51 L.Ed. 240, 243-244 (1906)], it can be said that Plaintiff has standing to *sue* to vindicate such of its "*own proprietary interests*" as are "*congruent with the interests of*" its "*inhabitants*" [*State of California* v. *Automobile Manufacturers Association, Inc.,* 481 F.2d 122, 131 (9 Cir. 1973)].

Plaintiff, it may be argued, is here seeking relief which is *unrelated to competition,* but even if this be so, it does have *standing to sue* under Section 16 of the Clayton Act, because the relief it seeks "*serves the antitrust function of ending an ongoing violation*" of the Sherman Act (*State of Washington* v. *Automobile Manufacturers Association,* supra, 538 F.2d 231, 237).

The site on which defendants have threatened to build a regional shopping center in order to forestall the construction of competing commercial facilities inside Plaintiff's boundaries is the prime reponsibility of the defendant Secretary of the United States Department of Housing and Urban Development (hereinafter this defendant will be called either "HUD" or "Federal Defendant").

The land comprising the site is the responsibility of HUD because two-thirds (2/3) of it lie within an "*urban renewal area*" created by a lavish expenditure of millions of dollars obtained from the federal government through loan and grant contracts entered into by and between HUD and the defendant Urban Renewal Agency of Santa Rosa (hereinafter "defendant Agency")pursuant to the provisions of the Housing Act of 1949 (42 U.S.C. 1441, 1452(a) (c), 1453, 1454, 1455,

1456).[13]

"Urban renewal area" within the context of the Housing Act means an area which HUD approves "as appropriate for an urban renewal project." Among the activities which may be undertaken in such a project under the Act is the *sale* of "any property acquired in the urban renewal area . . . *at its fair value* for uses in accordance with the urban renewal plan" [49 U.S.C. 1460(a) (b) (c) (4)]. All of this indicates quite clearly that "HUD" must see to it that property thus acquired when resold must be disposed of "at its fair value."[14] Further, since the Housing Act declares that such property be sold "at its fair value," HUD in properly discharging the duties cast upon it by Congress is required to see to it that such sales do not "offer private persons opportunities for enrichment or exploitation" [*Foeller* v. *Housing Authority of Portland,* 198 Ore. 205, 256 P.2d 752, 767 (1953)]. It would appear also that HUD has *not* been authorized to *delegate* the task of determining "fair value." Hence, HUD has promulgated elaborate rules and regulations designed to ensure that there is strict compliance with this Congressional mandate.

These rules and regulations are found in the "Land Marketing and Redevelopment" section of HUD's Urban Renewal Handbook (7214.1 Rev. 8/74). This part of the Handbook is comprised of six (6) chapters which extend over forty-eight (48) pages. Much of what

[13] Fitzhugh Affidavit (8-20-76), p.3, line 11 to p.4, line 19.

[14] A compelling reason for this is that the proceeds of land sales are used to retire the loan made by HUD to local Agencies. (Fitzhugh Depo., p. 35; Fitzhugh Affidavit, p. 5, lines 18-21).

appears in it is in the form of categorical directives addressed to local public agencies with whom it has Loan and Grant contracts.

In the beginning of this section HUD explains that the statutory term "fair value for uses in accordance with the urban renewal plan" means "the fair *market* value of the property for its highest and best uses permitted under the Urban Renewal Plan" (p. 1).[15] Then in conformity with the statutory scheme HUD adds that "all urban renewal land shall be disposed of at a price not less than its fair reuse value" and that the "fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land use to be imposed on the redeveloper by the Urban Renewal Plan" (p. 14).[16] In connection with this, it should be observed that the Santa Rosa Urban Renewal Plan "permits the land to be used for *commercial facilities* such as those which will make up the proposed shopping center," including but not limited to "retail stores, personal and business service establishments, restaurants and other places serving food and drink, and public and private parking lots."[17]

The HUD Handbook also provides that redevelopment agencies obtain *prior* HUD *concurrence* or *approval* in connection with any land disposition agreement which allows a period of eighteen (18) months or more between its execution and the delivery of a deed

[15] These references are to the pages of the "Land Marketing and Redevelopment" section of the Handbook.

[16] These price restrictions do not apply to land sold for low or moderate income housing. There is *no* provision for housing in this project.

[17] Fitzhugh Depo., Ex. 2, p. 5; Exhibit D, p.5, attached to Plaintiff's complaint.

to the land by an agency (p. 19).

Now, despite the statute and regulations promulgated thereunder, defendant Agency with the *prior* concurrence of HUD[18] has entered into a contract with defendant Ernest W. Hahn, Inc., a corporate developer (hereinafter "defendant Developer") whereunder the land in "urban renewal area," acquired with federal money, comprising two-thirds (2/3) of the shopping center site, will be sold to the developer for far less than its "fair market value."[19]

To understand how this has come to pass we must first examine some of the details of the contract and the nature of the project being undertaken on this land by defendant Developer.

The land to be sold to defendant Developer by defendant Agency consists of two sections of downtown Santa Rosa property. These two sections are commonly known as "*Phase II*" and "Phase III."[20] *Phase II*, comprising approximately twenty-one (21) acres was acquired and cleared with federal money furnished by HUD and title thereto is presently in defendant Agency.[21] Phase III comprising approximately twelve (12) acres is presently in private ownership and defendant Agency intends to acquire, improve and clear it through the use of tax increments, and without federal assistance.[22]

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[18] Johnson Depo., Ex. 1.
[19] This is, in effect a subsidy.
[20] Affidavit of J. K. Burns, "Hahn Contract," Attachments C2 and C4.
[21] Johnson Depo., Ex. 1; Daugherty Depo., Ex. 1, p. 4.
[22] Judge Orrick indicates in *N.A.A.C.P., etc.* v. *Hills*, 412 F. Supp. 102, 108-109 (D.C. Calif. 1976) that Community Development funds (42 U.S.C. 5301 et seq.) will be used to buy the site of the Sears, Roebuck store in Phase III.

The thirty (30) acre site thus created by the contractual fusing of Phases II and III is to be developed by defendant Developer into "a downtown commercial shopping center as an *integral* part of a federally sponsored urban renewal project."[23] Moreover, the development of Phases II and III as a *unit* "is necessary to make the proposed center economically feasible."[24] Accordingly, properly to perform the contract defendant Agency must acquire, clear and improve the land in Phase III, and defendant Agency has reported to the City Council of Santa Rosa that this task will require an expenditure of seven million eight hundred seventy-two thousand two hundred five dollars ($7,872,205).[25]

As regards the purchase price of the *Property*, the contract provides that the Agency may at its option choose either "Alternative A" or "Alternative B." Under "Alternative A" "the Agency will sell the *Property* to the Redeveloper for, and Redeveloper will purchase the *Property* from the Agency and pay therefor, the total amount of three million dollars ($3,000,000) . . . to be paid in case (sic) or by certified check simultaneously with the delivery of the deed or deeds conveying the *Property* to the Redeveloper."[26]

Under "Alternative B" the Agency will sell the *Property in Phase II* to the Redeveloper, and the Redeveloper will purchase said Phase II property from

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[23] Affidavit of J. M. Gilchrist, supporting Hahn's Motion for Summary Judgment, pp. 1-2, 2-3.
[24] Daugherty Depo., pp. 19-21; Ex. 1, p.5.
[25] Burns Depo., Ex. 40, Report to City Council, pp. 25a-25b.
[26] Burns's Affidavit, "Hahn Contract," p. 6.

the Agency and pay therefor, the total amount of two million dollars ($2,000,000), . . . to be paid in cash or by certified check simultaneously with the delivery of the deed or deeds conveying *said part of the Property*. The Agency shall additionally, convey *the Property in Phase III* to the Redeveloper without cost.[27]

If defendant Agency chooses *Alternative A*, the financial results are as follows:[28]

Cost of Acquiring, Clearing and Improving Phase III	*Less: Purchase Price*	*Net Proceeds of Sale*
$7,872,205	$3,000,000	($4,872,205)

If the Agency chooses *Alternative B*, the financial results are as follows:

Cost of Acquiring, Clearing and Improving Phase III	*Less: Purchase Price*	*Net Proceeds of Sale*
$7,872,205	$2,000,000	($5,872,205)

The language used by the parties in the contract makes it clear that they were conscious that "*the Property*" to be bought and sold was a unit and necessarily indivisible. Also that the use of the word "integral" by defendant Developer shows that it considered Phases II and III "essential to the completeness"[29] of the shop-

[27] Burns's Affidavit, "Hahn Contract," p. 8.
[28] This without taking into account that under Alternative A, defendant Agency must "pay the sum of $2,000,000 for the construction of parking facilities." Burns's Affidavit, "Hahn Contract," p. 6.
[29] Webster's Seventh New Collegiate Dictionary (1969), p. 439.

ping center site.[30] In addition HUD recognized that two Phases had to be developed as one "to make the proposed center economically feasible." Logically, therefore, the net cost or deficit incurred under either Alternative must be spread or distributed over the thirty (30) acres comprising the shopping center site.

If this net cost or deficit is distributed over thirty (30) acres, the financial result is as follows:

1. Alternative A ($162,406) per acre
2. Alternative B ($195,740) per acre

On the other hand, *if* this net cost or deficit is distributed over twenty-one (21) acres in Phase II, the financial result is as follows:

1. Alternative A ($232,009) per acre
2. Alternative B ($279,628) per acre[31]

Taking into account that HUD's "appraiser" has "appraised" the total value of Phase II of 21 acres for a total value of $1,829,520, or $87,120 per acre,"[32] the conclusion appears inescapable that the appraiser erred egregiously, and that the land in the "urban renewal area" is being sold for something considerably less than its "fair market value."

However, the true dimensions of the largesse being exhibited here cannot be fully accredited until one becomes aware of the actual amount of money expended in acquiring, assembling, clearing and improving 21.2 acres in Phase II of the project. As to this, the record

[30] Sears, Roebuck & Co., now in Phase III is expected to move into the new site, Daugherty Depo., Ex. 1, pp. 121-123.
[31] These figures are not startling when one considers that defendant Developer has made a deal to sell 6.33 acres in the site for $3,000,000 or $473,934 per acre (Hahn Depo., Ex. 6, p. 1).
[32] Johnson Depo., Ex. 2, p.c.

discloses the following:

Real Estate Acquisition	$4,980,430[33]
Relocation Expense	164,000[34]
Property Management	5,000[34]
Site Clearance	510,000[34]
Site Improvements	1,770,858[34]
Interest Expenses	864,000[34]
Administrative Expense	472,476[34]
Total Cost	$8,766,984

The total of the federal money shown above distributed over 21.2 acres gives us a figure of $413,536 per acre.[35]

This, of course, now brings us face to face with the total cost of acquiring, clearing and improving Phases II and III, and this total cost is as follows:

Phase II	$ 8,766,984
Phase III	7,872,205
	$16,659,189

Affidavits filed in support of HUD's motion for summary judgment disclose that HUD's concurrence in the disposition price of two million dollars ($2,000,000) for the Phase II land is based on a recommendation made by Mr. Johnson, a "Realty Specialist," employed by HUD.[36] Mr. Johnson's recommendation is in turn based on his review of two appraisals submitted to HUD, and a field review of the property.[37] Mr. Johnson has had *no* practical experience in real estate appraisal,[38] and hence is not an expert in that field. Accordingly, it is apparent that his recommendation cannot lend rational support to HUD's approval of the disposition price.[39]

[33] Answer of defendants City of Santa Rosa and Urban Renewal Agency, p. 7, lines 8-13; answer of defendant Developer, p. 9, lines 11-16.
[34] Burns's Depo., Ex. 40, pp. 25a-25b (Budget Analysis, Phase II, HUD Eligible Expense Items).
[35] Again, these figures are not startling when one considers that defendant Developer will sell 6.33 acres for $473,934 per acre. Note 31, supra.

HUD's "Realty Specialist" did *not* in making his recommendation take into account the *cost* of acquiring and clearing the land in either Phase II or Phase III,[40] although such cost is frequently considered by our Courts the *best* "evidence of fair market value (*Golstein* v. *C.I.R.*, 298 F.2d 562, 567 (7 Cir. 1962); *Tripp* v. *C.I.R.*, 337 F.2d 432, 434 (9 Cir. 1964); *United States* v. *Certain Land In Borough of Brooklyn, etc.*, 346 F.2d 690, 693-694 (2 Cir. 1965). Moreover, he appears to have been unimpressed by the fact that one of the two appraisals he reviewed declared that the site created by the fusion of the Phases was *unique* and possessed a "monopoly position."[41]

In the communication approving the disposition price of the Phase II property, HUD took pains to disclaim responsibility for the probable consequences that could flow from the prodigal disposition of the acreage in Phase III, and in this connection HUD said:

[36] Fitzhugh Affidavit, p. 5, lines 7-21; Johnson Affidavit, p. 1, lines 21-22.
[37] Johnson Affidavit, p. 2, lines 8-10; p. 2, line 22 to p. 3, line 1.
[38] Johnson Depo., 9-11-75, p. 7; Johnson Depo., 11-11-75, pp. 44-46.
[39] Mr. Johnson's recommendation is "hearsay in disguise," and therefore inadmissible (*United States* v. *Williams*, 447 F.2d 1285, 1290-1291 (5 Cir. 1971).
[40] Johnson Depo., 11-11-75, pp. 47-48.
[41] Johnson Depo., supra, pp. 48-50.

> "We have not reviewed either the disposition agreement or request for concurrence with respect to Phase III, since it is a state redevelopment over which HUD has not jurisdiction or authority." (Johnson Depo., 11-11-75, Ex. 1.)

This hand washing cannot avail HUD as it is responsible for the massive infusion of federal money which made the merger of the two Phases possible. We submit, therefore, that the following taken from the opinion in *Garrett* v. *City of Hamtramck*, 335 F.Supp. 16, 25 (D.C. Mich. 1971), is most applicable here:

> "Any discussion on Hamtranck's duties and responsibilities *cannot* be segregated from a realization that the federal government's involvement in the various Hamtramck programs *included* the approval and funding necessary to carry out those programs. Urban renewal is accomplished through federal means, and the federal government *must take responsibility for the direction which the program takes*. . . . and to proceed with such activities by *claiming innocence* of what has been or is being done with federal funds *cannot be tolerated*. If what has occurred in Hamtramck is ever to be stopped, *responsibility must be placed at the source*, that is, the Department of Housing and Urban Development which funds and administers the programs . . . ."

Moreover, Phase III is *essential* to the fulfillment of the hopes and aspirations that HUD entertains for "downtown Santa Rosa as a *regional* center for *retailing*, commerce and government." The following excerpts from HUD's E.I.S., will suffice to establish this fact:

> *"The only way to capture the project growth in the Santa Rosa regional retail market for downtown Santa Rosa and to insure that it is a regional center for retailing as well as business and government is to build a regional shopping center of the sort proposed by the Santa Rosa Renewal Agency.* Thus a smaller commercial development would not meet HUD's goal of creating a viable central city and preventing urban sprawl.
>
> A smaller shopping center would not of itself cause greater adverse environmental impacts than the proposed regional shopping center. It could actually improve the transition between the renewal project and existing commercial areas, if the proposed center is not redesigned. And it would reduce the impact of relocation and two historic buildings would not need to be moved.
>
> Such an alternative, however, would prevent Santa Rosa from gaining the benefits of improved downtown circulation, police and fire protection, earthquake safety, air quality and other minor project benefits such as increased landscaping and rodent extermination.
>
> *Much more serious would be the blighted condition of the Phase III area which would be worsened by removal of the Sears store to the new shopping area.* The alternative would cause the blight to adversely affect the viability of the City's renewal projects and perhaps the whole central business district.
>
> And, most serious of all, a smaller shopping center would fail to meet *HUD's basic goal of revitalizing downtown Santa Rosa as a regional center for retailing, commerce and government, and preventing unnecessary suburban development* when downtown land exists which can be recycled. As long as the possibility exists that downtown Santa Rosa can enhance its regional prominence in commercial

> and government activities by a compact, regional shopping center on blighted downtown land, such a project will be preferable to a smaller project which gives only short-term benefits and which may not be able to maintain its economic viability beyond that short time."[42]

What HUD has said in the E.I.S., shows that while it always had the power, it now has the *specific* intent to create a monopoly in the retail trade in downtown Santa Rosa. Moreover, what HUD has done in connection with what it has said, establishes that it has gone far beyond the mere administration of the Housing Act, and has become a "joint venturer," "partner" and "participant" with the other defendants in this scheme to restrain and monopolize commerce, and there are no *good faith* arguments that can justify its conduct [*Burton* v. *Wilmington Parking Aurthority,* 365 U.S. 715, 725-726, 6 L.Ed. 45, 52 (1961); *Holonak* v. *Avco Corp., etc.,* 514 F.2d 285, 288-289 (2 Cir. 1975); *Gatreaux* v. *Romney,* 448 F.2d 731, 739 (7 Cir. 1971)].

We should also note at this point that HUD's goals and activities are not circumscribed either by the boundaries of the urban renewal area or of the City of Santa Rosa. These transcend these boundaries because HUD conceives that its mission includes giving direction to the economic growth of Sonoma County and the prevention of urban and suburban growth or sprawl.[43] Thus the following is written in HUD's E.I.S.:

"But the most important problem caused by

[42] Daugherty Depo., Ex. 1, pp. 122-123.
[43] Fitzhugh Depo., 9-3-75, pp. 65-66.

> building a mixed use project that includes scaled down commercial uses would still be *the failure of Santa Rosa to capture the future retail growth of Sonoma County.* Such a project would fail to meet HUD's basic goal of revitalizing downtown Santa Rosa as a regional center for retailing, commerce and government and *preventing unnecessary suburban development when downtown land exists which can be recycled."*[44]

This establishes that HUD's aims and activities can and will vitally affect persons and entities whose businesses and properties are located outside the Santa Rosa Urban Renewal Area.[45]

The record indicates that there may be a basic conflict between what HUD is attempting to accomplish here, and what it must do in the proper administration of the Housing Act.

HUD avows that property over whose disposition it has authority must be sold at a price which represents fair market value for *uses in accordance with the redevelopment plan,*[46] and that this price *must be paid in cash*. Further, HUD avers that it does *not delegate* to defendant Agency or any other Agency the task of determining fair value.[47]

In any event, the views proclaimed by HUD are quite different from those entertained by defendant Agency and defendant Developer. The two defendants

[44] Daugherty Depo., Ex. 1, p. 130.
[45] Compare this situation with the one presented in *Gibson & Perrin Co.* v. *City of Cincinnati,* 480 F.2d 936 (6 Cir. 1973).
[46] "Fair market value" therefore must be determined on the basis of *all* uses permitted under the plan and *not* on the basis of a *specific use* such as a regional shopping center (*County of Santa Clara* v. *Curtner,* 245 C.A.2d 730, 743, 54 Cal.Reptr. 257 (1966).
[47] Fitzhugh Depo., 9-3-75, pp. 41-43.

assert that the developer of a regional shopping center should *not* be required to pay more for land than he can "afford to pay," or more than he can "reasonably be expected to pay." Thus the following appears in a memorandum from the Executive Secretary of the defendant Agency to its members:

> ". . . Other cities have encouraged the development of major regional shopping centers by providing and paying for public improvements, utilities and facilities, such as curbs, gutters, sanitary sewers, streets, street lights, water, storm drains, etc., *which usually would be paid for by the developer*. In others, the *cost of land has been reduced through redevelopment to a price a developer can afford to pay*. In any event, a developer *can only afford to pay* for land, buildings, parking and supporting off-site and on-site improvements and facilities *in an amount which can indicate the probability of a reasonable profit.*
>
> Thus, when cities assist such developments they are not subsidizing the developer so that the developer is paying less than he can reasonably afford to pay, but merely providing the economic and financial basis whereby *the developer pays what he reasonably can be expected to pay.*"[48]

The foregoing clearly establishes that defendant Developer will not pay fair market value for uses in accordance with the redevelopment plan.

Early on (11-15-72) an appraiser employed by defendant Agency forecast that the development of the downtown site "*under the limitation to regional shopping center use*" would develop only "*nominal land*

[48] Burns's Affidavit, Summary of Hahn Proposal.

value" of some three million dollars ($3,000,000) of which 73.3% would be attributable to Phase II.[49]

This appraiser also went on to inform defendant Agency that the planned regional shopping center in downtown Santa Rosa "*would kill off any possibility of a major development in Rohnert Park for a long time to come.*"[50]

Later, on June 12, 1973, another appraiser also employed by defendant Agency confirmed the forecast made by the first appraiser when he wrote that "the developer can pay *no more than a nominal sum for the land.*"[51]

All of this is likewise corroborated by other evidence in the record.

The testimony of the President and Chief Executive Officer of defendant Developer[52] is, in effect, that in arriving at the purchase price of the Santa Rosa shopping center site or any other similar downtown site this is determined "*by working backwards from the income that can be derived from the costs that can be paid for on the land for the costs of development.*" His testimony is also to the effect that land is about a seven percent element in the cost of the total project." Additionally, his testimony is that defendant Developer has no interest in and does not take into account "*the fair market value* (of the land) for any other uses under the redevelopment plan."[53] Finally, this testimony, in substance, indicates that defendant Devel-

[49] Burns's Depo., Ex. 30, Ratcliff's letter of 11-15-72 to Burns, pp. 1-2.
[50] Burns's Depo., Ex. 30, Ratcliff's appraisal, p. 24.
[51] Burns's Depo., Ex. 29, p. 3.
[52] Hahn Depo., p. 4.
[53] Hahn Depo., pp. 73-74.

oper is not "buying land," but is instead *creating land* in the form of elevated structures which should be considered some form of consideration to be received by the seller in addition to cash.[54] As to this, it should be borne in mind that HUD requires that the disposal price of such land be paid in cash, and not in some other form.

The foregoing shows that the defendants are not thinking of selling or buying in terms of "fair market value," but in terms of what the defendant Developer thinks he can be reasonably expected to pay for property. This makes evident the fact that HUD's goal of making Santa Rosa the economic capitol of Sonoma County is not compatible with its statutory duty of obtaining fair market value in cash for the acreage in Phase II.

The record goes on to disclose that defendant Agency and defendant City of Santa Rosa (hereinafter collectively "Santa Rosa defendants") have engaged in *anticompetitive* activities intended to forestall the development of the commercial area within Plaintiff's boundaries. This conduct obviously does not enjoy immunity as valid governmental action under the Sherman Act.

On September 27, 1974, the Santa Rosa defendants filed a Petition For Writ Of Mandate and Injunctive Relief in the Superior Court for the County of Sonoma against Plaintiff and against Hugh Codding, Codding

[54] Hahn Depo. pp. 75-76.

Enterprises, a corporation, Paul Golis and Cofego Enterprises, a limited partnership, *real parties in interest*.[55] The real parties in interest own property within Plaintiff's commercial area, and the purpose of the Petition For Writ was to enjoin Plaintiff from granting applications for the rezoning of the property involved thus effectively blocking its commercial development.[56] On December 24, 1974, the Superior Court ruled against the Santa Rosa defendants and in favor of Plaintiff and the real parties in interest denying the relief sought by the Santa Rosa defendants. This judgment became final in February, 1975.[57]

The *verified* answer of real parties in interest, Paul Golis and Cofego Enterprises, a limited partnership, reads in pertinent part as follows:

> "Said petition herein and the individuals directing them are engaged in the use of the courts to achieve their goals and they, and each of them know that:
>
> 1. Cofego is not trying to build a regional shopping center, but trying to provide the legitimate downtown center for the City of Rohnert Park.
>
> 2. That this property is originally part of the City of Rohnert Park and has been a part of the master plan for this purpose for the last twenty years/ (sic)
>
> 3. That the proceedings that Golis and Cofego have followed during the past year has been to develop this through a sub-division and the development of these properties and he has been unable to do so.

[55] Brandt Affidavit, p. 4, par. 8, and Ex. F attached.
[56] Brandt Affidavit, Ex. F, p. 17, line 12 to p. 18, line 25.
[57] Brandt Affidavit, p. 4, line 14; Ex. H attached.

> The intervention of the Agency and the City has already delayed the development of Cofego for several months. The actions of these individuals is arbitrary, compricious (sic) and malicious and they are trying to hold up the development of these premises and are using the courts herein to put illegal pressure on the battle between Codding and the City, over all of which Cofego and Golis have no interest or control."[58]

The deposition of Mr. Blackman, City Manager of Santa Rosa tends to support the substance of the above-quoted allegations. It discloses that the Santa Rosa defendants had learned and were concerned over the fact that Hugh Codding was attempting to persuade Sears, Roebuck & Company to move from downtown Santa Rosa to Plaintiff's commercial area. It also discloses that those defendants became concerned over the possibility of the development of two (2) regional centers just seven (7) miles south of Santa Rosa and its economic impact on that city. Finally, it discloses that because of all of these concerns the City Council authorized the filing of a suit.[59] It may be inferred from all this, as does the answering real party in interest, that regardless of the ostensible purpose of the suit, its real purpose was effectively to block the development of Plaintiff's commercial area.

Such anticompetitive conduct on the part of cities and other local bodies is not "automatically beyond the reach of the federal antitrust laws." Accordingly, in order to escape liability the Santa Rosa defendants

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[58] Brandt Affidavit; Ex. G attached, p. 2, line 28 to p. 3, line 15.

[59] Blackman Depo., p. 5; pp. 9-12; 12-14; pp. 16-17; p. 19.

must establish by competent evidence that all that they did here falls within the intended scope of the powers granted them by the California legislature, but they have presented no such evidence (*City of Lafayette, La.* v. *Louisiana Power & Light Co.,* 532 F.2d 431, 436 (5 Cir. 1976).

The record very clearly establishes that defendants have deliberately embarked on an anticompetitive course of conduct to cause "injury in fact" to Plaintiff and its property owners. Accordingly, their interests are, not arguably, *but very definitely within the zone of interests* to be regulated and protected by the several statutes which have been here so flagrantly violated [*Data Processing Service* v. *Camp,* 397 U.S. 150, 25 L.Ed. 184 (1970); *Barlow* v. *Collins,* 397 U.S. 159, 25 L. Ed. 192 (1970)].

II

ARGUMENTS

1. At pages 6-7 of its brief, HUD raises the question whether Plaintiff, who only has a financial or economic interest in the matter has standing to sue under NEPA.

The answer must be affirmative.

Injuries of a non-economic nature, widely shared aesthetic and environmental interests, *as well as economic injuries,* can amount to an "injury in fact" sufficient for standing under the Administrative Procedure Act [*Cady* v. *Morton,* 527 F.2d 786, 791 (9 Cir. 1975)].

2. At pages 6-7 of its brief, HUD raises the issue whether Plaintiff has standing to challenge a redevel-

opment plan.

This issue is irrelevant because Plaintiff has not challenged the Santa Rosa Urban Renewal Plan.

3. At pages 9-11 of its brief, HUD raises the issue whether interstate commerce is involved.

The answer must be affirmative.

The deposition of defendant Developer's President discloses that interstate commerce in building materials is involved in the construction of shopping centers, and that once such a center is in operation a very substantial amount of out-of-state merchandise will be sold therein (Hahn Depo., pp. 9-12; Ex. 1 attached).

Additionally, we have filed the affidavit of Dr. Claude Gruen showing that interstate commerce is definitely involved in the operation of regional shopping centers.

4. At pages 12-13 of its brief, HUD raises the issue whether HUD may be sued for violations of the antitrust laws.

The answer must be affirmative [*Contract Buyers League* v. *F & F Investment,* 300 F.Supp. 210, 216 (D.C. Ill. 1969); *Baker* v. *F & F Investment,* 480 F.2d 829, 831-833 (7 Cir. 1973)].

5. At pages 13-15, HUD raises the question whether it acted arbitrarily in concurring in the minimum disposition price of Phase II.

The answer must be affirmative.

The record clearly discloses that HUD in allegedly exercising its discretion relied on the opinion of a non-expert. Moreover, this opinion is inadmissible hearsay (Please see pages 13-14 of this Brief).

6. At page 3 of its Memorandum, defendant Developer contends that functions performed by private parties under the direction of a public agency are "exempt from application of the antitrust laws."

This is an invalid contention unless it be clearly shown that the public agency (HUD) involved has been accorded a specific exemption from the antitrust laws by Congress, and no such showing has been made here [*Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931, 945-947 (D.C. Cir. 1971)].

7. At pages 4-6 of its Memorandum, defendant Developer contends that Plaintiff lacks standing to assert antitrust claims.

This is an invalid contention and we have shown it to be so at pp. 1-6 of this Brief where we rely specially on the doctrines announced in *State of Washington* v. *Automobile Manufacturers Association,* supra, 538 F.2d 231, and *State of California* v. *Automobile Manufacturers Association, Inc.,* supra, 481 F.2d 122.

8. At pages 6-7 of its Memorandum, defendant Developer contends that Plaintiff cannot maintain an action as "*parens patriae*."

This contention is irrelevant because Plaintiff is not attempting to maintain an action as "*parens patriae*."

9. At pages 9-12 of their brief, the Santa Rosa defendants argue that the Court lacks subject matter jurisdiction for claims under the Sherman Act.

This argument has been dealt with for the most part at page 22, supra, of this Brief.

10. At pages 12-18 and pages 21-27 of their brief, the Santa Rosa defendants argue in substance that the Court is barred from entertaining any claim against the Santa Rosa defendants based on State Law.

This argument is irrelevant because Plaintiff makes no claims based on State Law. In making this argument these defendants have overlooked that the record establishes that HUD does not delegate to any State Agency "the task of determining fair value" (Please see our Brief, p. 17, supra).

11. At pages 18-21 of their brief, the Santa Rosa defendants make an argument that misconceives Plaintiff's *present* position regarding the E.I.S. which eventually was prepared and published on July 22, 1975. Plaintiff complains of the E.I.S. because HUD is using it to justify the sale of the property in Phase II at less than its fair market value, and this complaint is fully justified under the doctrine of *Cady* v. *Morton,* supra, 527 F.2d 786, 791.

12. At pages 28-33 of their brief, the Santa Rosa defendants argue that Plaintiff lacks standing to sue. This argument is fully dealt with at pages 1-6 of this Brief.

13. At pages 33-35, the Santa Rosa defendants argue that valid governmental action cannot give rise to liability under Sherman. This argument, of course, begs the question because it has not been established that the action taken by the governmental defendants is in fact valid. Defendants are reminded that not every governmental act points the path to an antitrust shelter [*Alabama Power Co.* v. *Alabama Electric Cooperative,* 394 F.2d 672 (5 Cir. 1968)].

The motions for summary judgment and to dismiss should be denied.

Dated: October 19, 1976.

Respectfully submitted,

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RICARDO J. HECHT
COTTON, SELIGMAN & RAY

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

CERTIFICATE OF SERVICE
BY MAIL

I, the undersigned, RICARDO J. HECHT, one of the attorneys for the Plaintiff in the above-entitled action, hereby certify that I have served copies of the foregoing "Plaintiff's Brief In Opposition To Motion For Summary Judgment," "Affidavit of Dr. Claude Gruen," "Affidavit of Roland L. Brust," and "Affidavit of R. Dean Stahr" on the attorneys for the defendants by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to said attorneys at their respective addresses which addresses are the last addresses of said attorneys known to me.

Dated: October 19, 1976.

By: RICARDO J. HECHT

RICHARD E. BRANDT, ESQ.
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A Professional Corporation
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Santa Rosa and Urban Renewal Agency
of the City of Santa Rosa

United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic; and Ernest W. Hahn, Inc., a California corporation,
Defendants.

REPLY OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I

INTRODUCTION

This memorandum is submitted by the City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (the "Santa Rosa defendants") in reply to the brief and affidavits of plaintiff City of Rohnert Park in opposition to the defendants' motions for

summary judgment. This reply deals first with plaintiff's responses to the arguments of the Santa Rosa defendants' motion for summary judgment, which are set forth at page 24 of the plaintiff's brief, and then addresses the contentions made in the section of plaintiff's brief entitled "Statement of the Case."

II
ARGUMENT

A. LACK OF SUBJECT MATTER JURISDICTION OVER ALLEGED SHERMAN ACT VIOLATIONS.

Plaintiff argues that *Sapp* v. *Jacobs*, 408 F. Supp. 119 (S.D. Ill. 1976) and the other cases cited by the Santa Rosa defendants to demonstrate the absence of subject matter jurisdiction for any Sherman Act claim do not show such a lack of subject matter jurisdiction under the circumstances here presented because building materials for the proposed Santa Rosa Regional Shopping Center will be purchased in interstate commerce and because Mr. Hahn and Mr. Claude Gruen, plaintiff's economist, believe that if the Santa Rosa Shopping Center is built, Sears, Roebuck & Co., R.H. Macy Co., and similar stores in the Santa Rosa Center are likely to purchase goods in interstate commerce for resale at their stores. As has been explained in the Santa Rosa defendants' brief, *Sapp* v. *Jacobs* expressly discredits this "building materials" theory. Moreover, the major fallacy of plaintiff's argument is that all of the interstate activities plaintiff refers to involve the proposed Santa Rosa Center. Plaintiff's complaint is that commerce will be burdened and restrained with respect to the potential regional shopping center site

in Rohnert Park. No facts have been submitted showing an impact on interstate commerce with respect to the proposed development of a shopping center or retail sales activity at the City of Rohnert Park shopping center site.

B. THE BAR OF PLAINTIFF'S CLAIMS BY THE PREVIOUS *IN REM* PROCEEDING IN THE SONOMA COUNTY SUPERIOR COURT.

Plaintiff argues that its action is not barred by the previous Sonoma County Court *in rem* proceeding "because plaintiff makes no claims based on State Law." The error of plaintiff's argument is that the previous Superior Court action involved the litigation of matters of federal law, specifically, the allegation that the sale to Hahn violates the standard for adequacy of consideration set forth in 42 U.S. Code, Section 1460 (c)(4), and Section 1472.1 of the Urban Renewal Handbook of the Department of Housing and Urban Development and the claim that the proposed Santa Rosa development will constitute a monopoly and an unlawful combination or conspiracy in restraint of trade (see First Amended Complaint, Action No. 79762, Exhibit A, Affidavit of Richard E. Brandt). These issues were litigated as the first cause of action and the sixth cause of action of the State Court suit. They have been resolved conclusively against plaintiff by the Intended Decision and the Court's intended conclusions of law which are attached, respectively, to the first and second affidavits of Richard E. Brandt in support of the motion for summary judgment.

C. ENVIRONMENTAL IMPACT STATEMENT.

Plaintiff contends that based on *Cady* v. *Morton*, 527 F.2d 786, 791, it is entitled to maintain a claim relating to the Environmental Impact Statement ("EIS"). The particular passage in the case referred to by plaintiff states that an injury which is both economic and environmental in nature can amount to an "injury in fact" sufficient to give a party standing to assert a claim for an alleged violation of the National Environmental Policy Act ("NEPA"). Plaintiff's evidence in opposition to summary judgment describes only economic consequences from proposed redevelopment activities. Two essential elements for a cause of action based on *Cady* that plaintiff lacks are: (1) an alleged violation of NEPA, and (2) an alleged environmental consequence injurious to the plaintiff. Since an EIS has been prepared, and plaintiff apparently does not claim the EIS is defective, there is no genuine issue as to any material fact involving a claim founded on NEPA. Plaintiff has not even attempted to respond to the arguments of the Santa Rosa defendants that the remaining federal involvement in the redevelopment of downtown Santa Rosa is not sufficient to justify any relief against them, even if the federal defendants have failed to comply with NEPA.

D. PLAINTIFF LACKS STANDING TO SUE.

Plaintiff claims it has standing to sue because "Plaintiff has been acting as the representative or agent of almost a score of property owners and this leads to the conclusion that it has '*standing*' to sue on their behalf (citation omitted)." The affidavit submitted by Ronald Burst, City of Rohnert Park Engineer, shows that the property owner with by far the greatest interest in the proposed shopping center is Codding Enterprises. Plaintiff also claims it has standing because it owns part of the property at the Rohnert Park site, property which is held as a proposed library site. (Deposition of Callinan, Vol. I, pp. 35-39.) The City of Rohnert Park, of course, has presented no evidence by affidavit or otherwise that demonstrates it intends to develop commercial facilities, itself, or go into the business of retail trade.

The arguments and affidavits submitted by plaintiff make precisely the point that the Santa Rosa defendants argued in their own brief in support of their motion for summary judgment: plaintiff's interest in shopping center development at the Rohnert Park site is the indirect economic consequences upon the businesses that might develop facilities there. As is explained in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (1973); *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962); and *Pittsburgh Hotels Assn.* v. *Urban Redevelopment Authority of Pittsburgh*, a party complaining of such an indirect economic consequence of a redevelopment project has no standing to sue for an alleged violation of the Federal Housing Act of 1949 or an alleged failure to comply with the federal laws and regulations dealing with the adequacy of a land disposition prices. Similarly, as a representative of its inhabitants not itself engaged in real estate development or retail trade, plaintiff cannot sue for alleged violations of antitrust laws affecting its inhabitants

who may be engaged in such activities (see *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 31 L.Ed.2d 184, 92 S.Ct. 85 (1972). To sue for an alleged violation of NEPA, the plaintiff must allege a violation of that law and resulting injury. With the completion of the EIS, there is no alleged violation in this case.

E. ANTITRUST IMMUNITY AND LACK OF EVIDENCE OF ANTITRUST VIOLATION

Plaintiff argues that the Santa Rosa defendants' claim of govenmental immunity from the antitrust laws under the circumstances alleged in the complaint

> "begs the question because it has not been established that the action taken by the governmental defendants is in fact valid."

On the face of the record presented through the affidavits in support and in opposition to these motions for summary judgement, the acts of the government defendants complained of, including those of the Santa Rosa defendants, are governmental actions within their jurisdiction to act. For this motion, as for a trial, it is the burden of plaintiff to show some facts that support the allegation that antitrust violations are masquerading as government action. Even accepting the plaintiff's "characterization" of the facts, its antitrust claims reduce the simple charge that the government subsidy to redevelopment violates the Sherman Act. This "theory" is discredited by *Gibson & Perrin Co.* v. *City of Cincinnati, supra*. Plaintiff has cited no authority for the novel proposition that a government subsidy constitutes a restraint of trade or that the incidental economic consequences flowing from such a

subsidy can be an illegal monopoly.

III

PLAINTIFF'S "STATEMENT OF THE CASE"

Plaintiff's "Statement of the Case" sets forth the facts most favorable to the plaintiff and characterizes them to support its argument. For the most part, the facts can be separated from the arguments and characterizations by reference to the affidavits and exhibits to affidavits submitted in support and in opposition to the motions for summary judgment. However, on two matters, the plaintiff's version of the is materially misleading; these are the description of the terms of the Hahn contract and the account of the interests of the federal defendant and Santa Rosa defendants in opposing the development of a shopping center in Rohnert Park.

A. THE HAHN CONTRACT.

Plaintiff's discussion of the Hahn contract and the law relating to the adequacy of land disposition prices hopelessly confuses the distinctions between the function of the Court and the function of the public agencies, the initial cash payments of Hahn and the total contract consideration, and the public costs of slim clearance and the fair value of land that has been cleared for redevelopment.

If the adequacy of the disposition price to Hahn is challenged by a party with standing to sue, the rcle of the Court is not to determine the value of the property, but rather to determine whether the Department or

the Urban Renewal Agency abused its discretion in determining that the price to be paid by Hahn satisfied the standard of the federal law and regulation or the State law. Although the plaintiff filed its lawsuit in November of 1974, it chose not to submit any evidence on the value of the urban renewal project property to the federal administrator, prior to the November 1975 federal concurrence in the contract and land price, or to the Agency, prior to its approval of the contract in December of 1975. The question for the Court, if any, is whether the evidence before the federal defendant and Agency, *viz.*, the appraisal of David E. Lane and the other appraisals which conclude that Hahn is paying fair value, is so false and fraudulent that it cannot be deemed to support the federal concurrence in the contract or the Agency approval of the contract. The only evidence submitted by plaintiff to meet this burden is the appraisal review of Mr. R. Dean Stahr.

Precisely the same issue was presented to the Honorable J. Hilary Cook in the consolidated State cases entitled *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.* The testimony of Mr. Stahr at that trial, a partial transcription of which is attached to the second affidavit of Richard E. Brandt, was identical in all material respects to the statements of his affidavit submitted in opposition to this motion. The question posed to Judge Cook was whether, in view of Mr. Stahr's testimony, the finding of the Agency in approving the Hahn contract that the price established by the contract was "fair and equitable for the land according to its value for reuse and . . . not less than the fair value of the land for uses in

accordance with the redevelopment plan . . ." was supported by substantial evidence contained in the record of the Agency's action. Under California law, if Mr. Stahr's testimony raised a question as to the integrity of the evidence before the Agency as to the value of the property Judge Cook would have been required to apply his independent judgment to determine whether there had or had not been a violation of the law relating to the adequacy of the disposition price. See, *In re Redevelopment Plan for Bunker Hill*, 61 C.2d 21, 38, 37 Cal.Rptr. 74, 389 P.2d 538 (1964). As is shown by the Notice of Intended Decision attached to the first Affidavit of Richard E. Brandt, and the conclusion of law attached to his second affidavit, Judge Cook determined that the Agency's finding with respect to the adequacy of the price was supported by substantial evidence and was not placed in question by Mr. Stahr's testimony.

When examined in detail, Mr. Stahr's testimony is clearly [sic] inconsistent with the evidence on value before the government defendants. The Lane appraisal concedes that the project area site could be sold at a higher price per square foot if sold in parcels as Mr. Stahr suggests, but Lane also concludes, based on the non-speculation requirement of the redevelopment plan and the past history of sales in the project, that sale in parcels would take approximately ten years. The Lane appraisal shows that the present value of sales at higher prices over the course of ten years is less than the cash price that Hahn will pay now. Mr. Stahr does not address the question of the time necessary for disposition as parcels or the effect of non-

speculation restrictions.

Plaintiff also creates confusion by its many references to Phase III. Phase III is not assisted by the federal government under the Housing Act of 1949. It is not subject to any federal regulations concerning the price paid for land sold in such a federally-assisted urban renewal project. The analysis of Phase III costs and prices contained in pages 11 and 12 of plaintiff's brief is irrelevant to any issues relating to the Housing Act of 1949. More important, plaintiff's analysis ignores the total consideration of Hahn for the site in the urban renewal project. The $2 million and $3 million cash prices referred to by plaintiff are but a fraction of the total consideration. Under the alternatives of the contract, Hahn will either pay all costs of constructing public parking facilities or all costs in excess of $2 million. The appraisal of Mr. Lane (at page 60) estimates the cost of these facilities will exceed $7.5 million. In other words, Hahn must pay between $5 million and $7.5 million for parking, in addition to the cash price. Also, Hahn may be required to pay a fee in lieu of parking assessments of $401,000 per year or more. The many elements of Hahn's consideration are explained in the contract summary attached to the affidavit of Mr. Burns.

The gist of plaintiff's antitrust theory is that Hahn will receive a competitive advantage by acquiring the downtown Santa Rosa site at a bargain. The evidence in the administrative record demonstrates just the opposite. Hahn will pay $6 million more for the opportunity to develop in downtown Santa Rosa than it would for a comparable opportunity to develop in a suburban

site, such as that in Rohnert Park. (Affidavit of Burns, Transcript 10/29/74, page 12.) Mr. Hahn has testified that the terms of the contract for the downtown Santa Rosa site are not more favorable to his company than the terms of any of its many contracts for disposition and development. (Deposition of Hahn, pp. 36-42.) Other contracts for disposition of land in downtown areas subject to HUD's concurrence are among the many disposition contracts Mr. Hahn identified as being more favorable to his company than the contract for disposition of the land in Santa Rosa. On the other hand, the Rohnert Park site has received an $842,000.00 subsidy from the state and federal governments for the construction of a freeway interchange. (Deposition of Callinan, Vol. I, pp. 60-68.)

Finally, the reference in plaintiff's brief to the cost of acquiring and clearing the property Phase II and Phase III is irrelevant. Hahn is not receiving all of Phase II and plaintiff has failed to show the cost of the property being conveyed to him in that part of the project. Furthermore, what plaintiff is attempting to argue is that Hahn must bear the public cost of slum clearance. Plaintiff is, in effect, saying that slum clearance is not a proper governmental function. This question, of course, has long since been decided against plaintiff by *Berman* v. *Parker*, 38 U.S. 26, 96 L.Ed. 27, 75 S.Ct. 98 (1954), and the many other state and federal decisions holding that redevelopment is a legitimat function of government.

B. THE DEFENDANTS' INTERESTS IN ROHNERT PARK DEVELOPMENT.

Plaintiff's brief, at pages 15-18, quotes at length from the EIS and various other documents to show that the Department of HUD and the Santa Rosa defendants have a specific purpose and intent of locating retail development in downtown Santa Rosa and preventing such development at the site in the City of Rohnert Park. The inference of plaintiff's brief is that this is a scheme between the federal government and the Santa Rosa defendants to serve their own purposes. The fact is that locating retail development in Santa Rosa rather than Rohnert Park is a goal of the regional plan of the Association of Bay Area Governments. Exhibit V to the deposition of Peter Callinan, plaintiff's City Manager, is a letter from the Association of Bay Area Governments in response to an environmental impact report prepared for the proposed development at the Rohnert Park site. The letter, attached hereto as Exhibit A, points out that the proposed Rohnert Park shopping center development, by placing a regional shopping center outside existing urban centers on undeveloped land, promotes suburban sprawl and violates the 1970-1990 Regional Plan. The genuine concerns of the Santa Rosa defendants for environmental impacts from the proposed development of a regional center in Rohnert Park are further explained in the pleadings of the lawsuit by the City of Santa Rosa against the City of Rohnert Park, which are attached to the first affidavit of Richard E. Brandt in support of this motion.

IV

CONCLUSION

The Santa Rosa defendants submit that plaintiff's response to their motion for summary judgment has failed to identify or raise any genuine issue of material fact, that they are entitled to judgment as a matter of law, and that their motion for summary judgment should be granted.

Dated: October 22, 1976

Respectfully submitted,

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation
By RICHARD E. BRANDT

Attorneys for Defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa

EXHIBIT A

June 17, 1974

Mr. Paul Skanchy, Planning Director
City of Rohnert Park
6750 Commerce Boulevard
Rohnert Park, California 94928

Dear Mr. Skanchy:

Thank you for providing us with an opportunity to review the Draft Environmental Impact Report (DEIR) for the proposed Cofego/Codding Regional Commercial and Residential Development. We apologize for not providing our comments in sufficient time for the June 13 hearing. Considering the significance of the project, however, the review period allowed has not been adequate. The State Guidelines suggest that in order to provide sufficient time for public review, review periods for draft EIR's "should not be less than 30 days nor longer than 90 days except in unusual situations." (Public Resources Code, Section 15160)

The enclosed comments, based on a staff analysis, are directed toward the adequacy of the information provided with particular emphasis on regionally significant impacts. The outcome of this review, therefore, cannot be construed as an indication of the Association's support or non-support of the project.

The proposed project includes a regional commercial facility which is, by its very nature, regionally significant. Nevertheless, despite the State Resources Agency's requirement that the regional setting be considered with specific reference to related projects (Public

Resources Code, Section 15142), the DEIR makes no reference whatsoever to the policies of the ABAG *Regional Plan 1970:1990*. Because the proposal is privately financed it is not subject to review by ABAG in its capacity as the Federally-designated clearinghouse for the nine-county Bay Area. ABAG's Executive Committee has, however, indicated the agency's interest in reviewing and making recommendations on developments of this type because of their inherent regional significance. Moreover, due to the magnitude of the proposed project's impact, it will without question generate applications for Federal assistance which will require ABAG review pursuant to Office of Management and Budget Circular A-95 (e.g., the Rohnert Park interceptor). For this reason it is imperative that the relationship this proposal bears to adopted regional objectives and policies be understood at the outset.

As a multi-jurisdictional regional planning agency, ABAG has formulated and adopted regional policies which are to be used as guidelines for determining whether local actions will enable achievement of regional objectives. Foremost among these policies is the concept of the City-Centered Region which emphasizes the revitalization of existing urban areas and the clustering of smaller communities into centers of sufficient size to provide a full range of facilities and services. For the purposes of the Regional Plan, all towns or combinations of towns over 50,000 population are designated as community centers. At this scale it is possible to plan for and promote living, working and shopping within the same community thereby reducing re-

liance on the automobile and enabling preservation of the region's natural resources. The plan makes a clear commitment to the strengthening of existing community centers meeting these criteria. In view of these policies, it appears that a facility designed to draw patrons from other cities (i.e. Santa Rosa, Petaluma and, perhaps, more distant parts of Sonoma and northern Marin Counties) would generate impacts incompatible with these regional objectives. On the other hand, commercial developments designed and scaled to accommodate the market demands of Rohnert Park/Cotati residents would appear consistent with regional goals.

The balance of our comments are directed toward more specific aspects of the DEIR as follows:

1. *Alternatives* – State Guidelines require that the discussion of alternatives include not only alternative uses of the site, but also alternatives to the project's location, "which could feasibly attain the basic objectives of the project." It is unclear from the report exactly what the project's objectives are — commercial facilities to meet the needs of Rohnert Park/Cotati residents or a regional shopping center to accommodate a market including Santa Rosa, Petaluma and northern Marin County. If the intent is to command a substantial secondary market (which appears to be the case given the classification of *regional* commercial), alternatives must include redevelopment of the Santa Rosa and Petaluma Central Business Districts and alternate sites for regional shopping centers, such as the Hanna Ranch proposal in

Novato. The discussion of the project's impacts must then also include adequate consideration of the economic impact on existing and proposed commercial development in cities which would be included in the market area. Given the report's population projections for the area (37,000 permanent residents by 1990), a significantly scaled-down single shopping center or several smaller neighborhood commercial areas would appear adequate to meet strictly local needs. By way of comparison, the primary market area for the proposed Hilltop Shopping Center in Richmond, a facility with *half* the gross leasable area of the Rohnert Park project, has a projected 1990 population of 247,600.

2. *Traffic Impacts* – although the project is referred to as a *regional* commercial center and the report indicates that up to 114,000 vehicle trips per day could be generated at saturation, the discussion of traffic impact is limited to local streets. The average daily traffic volume on U.S. Route 101 in the vicinity of Rohnert Park is now about 42,500. What is the design capacity of this route? What percentage of the trips generated by the regional commercial areas would utilize 101? What other projects in the vicinity may also effect an increase in 101 usage? What capacity improvements will be required and by what year?
3. *Air Quality* – The report's conclusion that the increased vehicular emissions resulting from the proposal "are not considered to be of a significant value to cause major adverse impacts" is not sub-

stantiated. Based on information included in the section on Trip Generation, the total project is estimated to have a maximum generation potential of close to 114,000 trips per day (V.3), although the section on Air Quality inexplicably uses the figure of 50,000 trips (IV.12). The Bay Area Air Pollution Control District's proposed criteria for defining indirect sources of air pollution consider a non-residential facility capable of generating 5,000 or more vehicle trips in any eight hour period to be of sufficient magnitude to be considered a potential significant source of pollutants. The Federal Environmental Protection Agency's proposed criteria for less urbanized areas include new parking facilities with a capacity of 2,000 or more vehicles. While the DEIR fails to indicate the number of parking spaces which would be provided, using the standard ratio of 5 spaces per 1000 square feet of gross leasable area and the potential yield of the project at full development (2.5 million square feet), the figure *12,500* can be derived.

The bulk of the air quality information included in the DEIR relates to the Bay Area as a whole and provides virtually no basis for analysis of the project's incremental impact in the primary area. Pollutant emissions for the Santa Rosa Air Basin, rather than the entire district, would be far more meaningful and useful for this purpose. Moreover, the limited relevant information is contradictory. The fact that Rohnert Park and Santa Rosa are in the same valley — one which

has already been identified as having a potentially serious air quality problem — is far more significant than the similarity between "urban conditions" in Petaluma and Rohnert Park. According to the report, the weekly oxidant level in Santa Rosa from October 1972 to September 1973 averaged between .07 and .08 ppm during the months of October, December and March. It seems that this is more important than the fact that the standard (.09 ppm/hour) was actually exceeded only 8 days during 1973. A project that will, by conservative estimates, double emmissions in an area already subjected to high oxidant levels because of seasonal inversions cannot be considered to be of negligible impact.

Finally, the conclusion that the only realistic mitigation of air pollution can occur at the manufacturing level is completely contrary to the findings of those public agencies involved in air quality regulation. The realization that land use planning practices which encourage continued reliance on the automobile have a sigificant effect on air quality was precisely the rationale behind establishing indirect source review procedures. Conversely, actions that reduce automobile usage, such as the development of commercial facilities in areas served by pubic transit, the reduction of parking spaces in suburban facilities or the introduction of local transit in conjunction with the development of projects such as the one under consideration here, can all serve to reduce pollutant emissions.

4. *Flood Problems* – Rohnert Park has been identified by the Department of Housing and Urban Development as a community which has special flood hazards. Is Rohnert Park eligible for inclusion under the National Flood Insurance Program? If so, what land use and control measures have been adopted in compliance with the program's regulations? In order to qualify for inclusion, local governments in flood-prone areas must adopt building permit systems and impose zoning and building codes which assure that new structures will withstand minimum flooding conditions. The DEIR, however, notes only that the engineering and construction methods to be utilized in project construction are anticipated to be those "normally associated with low-rise commercial construction found in the Bay Area." (III.6) Under the provisions of the Flood Disaster Protection Act of 1973 (Public Law 93-234), all Federal aid and Federally-related assistance will be denied in flood-prone communities which fail to qualify for participation in the Flood Insurance Program by July 1, 1975. This sanction includes mortgage loans from banks under the Federal Deposit Insurance Corporation and assistance to cover restorative work after a flood disaster occurs.
5. *Economic Impact* – The report estimated revenues based on the project's assessed valuation at full development. The assessment of public costs is limited to consideration of municipal operating costs and disregards the other public expenses

which would be required to support a 275-acre commercial development and the prerequisite local population of 50-60,000. It is noted, for example, that the existing water and wastewater treatment systems are inadequate to meet the proposed project's demands. Improvements to state and interstate highway routes may also be required to provide additional capacity in response to the project's effects. The cost of these projects — financed by Federal and State aid, tax revenues and user fees as well as by direct outlays by municipal and county government to provide the local share of public facilities construction — must be considered as well as the provision of public services once the project has been completed.

We hope this information will be of use in your own review of the project. Please contact us if further information or clarification is required. We would also appreciate receiving a copy of the Final EIR, including other agencies' comments on the DEIR, when it is available.

Sincerely yours,

Rudolph R. Platzek
Director of Planning and Programming

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above entitled action; my business address is 555 Capitol Mall, Suite

950, Sacramento, California 95814. On October 22, 1976, I served the within REPLY OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and SECOND AFFIDAVIT OF RICHARD E. BRANDT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

Mr. William M. Brinton, Esq.
Mr. Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
Alcoa Building, Suite 1400
One Maritime Plaza
San Francisco, California 94111

Mr. James L. Browning, Jr.
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P.O. Box 36055
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Mr. William N. Willens
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1150 Union Bank Tower
Del Amo Financial Center
Torrence, California 90503

I, Mary M. Miller, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 1976, at Sacramento, California.

Mary M. Miller

RICHARD E. BRANDT, ESQ.
MCDONOUGH, HOLLAND, SCHWARTZ & ALLEN
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555 Capitol Mall, Suite 950
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Attorneys for Defendants City of
Santa Rosa and Urban Renewal Agency
of the City of Santa Rosa

United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a Municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic; and Ernest W. Hahn, Inc., a California corporation,

Defendants.

SECOND AFFIDAVIT OF RICHARD E. BRANDT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Richard E. Brandt, being first duly sworn, deposes and says:

1. In the course of my duties as one of the attorneys for the defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa, I have represented said defendants in the consolidated cases entitled *Codding Enterprises, et al., plaintiffs,* v. *Urban Renewal Agency of the City of Santa Rosa, et al., defendants*, Sonoma County Superior Court, Nos. 79465/79762/84237/81799, referred to on page 3 of the Affidavit of Mr. R. Dean Stahr submitted in opposition to the motion for summary judgment.

2. Mr Stahr appeared and testified as a witness in *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.* His testimony was taken down in shorthand by Mr. Jack Riffle, Certified Shorthand Reporter, and thereafter transcribed in typewritten form by Mr. Riffle. Exhibit A to this affidavit is a partial transcript of the testimony of Mr. Stahr. Exhibit B is a page of the same transcript reflecting that I, as one of the attorneys for the defendants, withdrew my motion to strike Mr. Stahr's testimony at the close of his testimony. To the best of my recollection, the partial transcripts attached as Exhibit A and Exhibit B accurately reflect the testimony given by Mr. Stahr at the trial, and the questions and comments of counsel and the Court at that time.

3. Mr. Stahr was the only appraiser who testified at the trial in *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.* The only other appraisal evidence of the value of property in the Santa Rosa Center Urban Renewal Project presented at the trial in the *Codding Enterprises* action was the evidence contained in the Administrative Record lodged with the Court of the Urban Renewal Agency action on the contract for disposition and sale of land to Ernest W. Hahn, Inc. That record, which includes,

among other matters, the appraisal of David E. Lane, MAI, is the same record which is attached to the Affidavit of James K.Burns in support of this motion for summary judgment.

4. Subsequent to Judge Cook's announcement of his Intended Decision in the *Codding Enterprises, et al.* v. *Urban Renewal Agency of the City of Santa Rosa, et al.*, which is attached to my first affidavit in support of this motion, the defendants in that action requested findings of fact and conclusions of law, and filed objections to the proposed findings of fact and conclusions of law submitted by me at the direction of Judge Cook. On October 13 and October 14, 1976, a hearing was held in Markleeville, California, at which proposed findings of fact and conclusions of law prepared by me, and the objections and proposed counterfindings of fact and conclusions of law of the defendants were argued by counsel and Judge Cook decided which findings and conclusions to adopt or modify as his own. At the close of that hearing, Judge Cook instructed me to prepare findings of fact and conclusions of law in accordance with his decisions. The findings of fact and conclusions of law which Judge Cook instructed me to prepare and submit for his signature include those attached hereto as Exhibit C.

5. The foregoing facts are true of my own personal knowlege and, if called as a witness, I can competently testify to them. This affidavit is submitted in support of the motion for summary judgment of the defendants City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa.

I declare under penalty of perjury that the foregoing

is true and correct.

Executed on October 21, 1976, at Sacramento, California.

RICHARD E. BRANDT

Subscribed and sworn to before me
this 21st day of October, 1976.

JOANNE G. SNIDER
Notary Public

EXHIBIT A

burden is going to be upon you to make the motion.

MR. BRANDT: Yes, Your Honor.

THE COURT: All right. Proceed, counsel.

Q Mr. Stahr, have you made a market study of the property in the Urban Renewal Area of downtown Santa Rosa?

A Yes.

Q And what is a market study?

A Well, basically what was done was all the sales in the area, both agency and independent, back through 1969, I believe, were investigated and plotted. Out of that I came out with 40 sales of property that were either bare, bare land or nearly bare land and plotted it on a chart, and I did the same thing with the Urban Renewal sales, and the results was an estimate of the fair market value for the property within the project.

Q And you have prepared a map or a chart of the area; is that correct, Mr. Stahr?

A Yes.

Q Is this that map?

A Yes.

Q Mr. Stahr, could you explain to the court the details on that map?

A Yes. To keep the map from becoming too cluttered, the numbers are quite small. Also to make it fit two boards, north is slightly different than on the map that Your Honor has been looking at. The freeway is to the left. The freeway is to the left. The area of the district is outlined in red. Phase II is up to Fifth Street; Phase III above. There is the Sears store. The main

street, two-way, is Fourth Street. The plaza has a big X through it. The sales that were plotted, the numbered sales or independent sales are here and they covered commercially-zoned properties in a wide area. The lettered configurations are within the Urban Renewal District No. I and they represent sales prices starting with the location of the city hall which is, oh, for about $1.88 or seventy cents, sixty-four cents in 1965. The sales price in the Urban Renewal Area — let me, before we get into that do this. The area of sales that are outside of the Urban Renewal District No. I varied from a low of about $1.75 or $1.70, which is in the peripheral areas. Here's two thirty-four off on E Street. Here's $2.05, and in '72 and on Fifth Street. The sales in this area, particularly during the appraisal of the parking lots were four to six dollars, and in various appraisals that have been done in the area, the values went from four dollars to the $6.50 generally.

The most important sales, after getting into it, became the sales of the Urban Renewal District No. I, because they were first bare land, but secondly, they were sold with the restrictions that are on the subject property, and these sales prices starting in 1961 were as low as one dollar a square foot for a 27,240 square-foot site to Santa Rosa — Burbank. The highest one was for $9.80 or $10 in the area of Fourth for the — no, in the area of the Square, which is C-1 for the Federal Eureka Building. The last sales, the ones that took place in '73-74 varied from a low of three dollars for the Chamber of Commerce building for an acre to $10 a square foot for a hundred — excuse me — the Chamber of Commerce building was 14,572 square feet, to a

high of $10 to the Northern California Savings & Loan.

Now, these high sales have always been pretty much the same.

Now, starting back in, when Urban Renewal was first brought in, the highest sales were at the Courthouse Square. At that time there was a courthouse in the middle and the street came around and they took the courthouse out and at that time I had $10 a square foot for land acquired on Fourth, on the north side of the Courthouse Square. An adjacent and independent sale No. 16 was to the Exchange Bank on Fifth Street in 1970, which was slightly over $10 a square foot. The sales now in the Urban Renewal District that were sold to the, they call it the Hoffman contract, but it's really, Wells Fargo is going to occupy an area larger here, and we are talking basically of $10 a square foot for their purchase. Some is a little over, some is a little under.

The sales of the property stopped at D Street. There is some independent sales that took place when this was an old industrial area, warehouses and so forth, and to the north there is a hospital in the corner. There is Sears, a Ford agency. Fifth is where it stopped.

Those values in that area during the parking lot acquisition and for the acquisition by the agency were, well, this one adjacent where A Street is between Fourth and Fifth was five dollars to five and a half. Among four appraisers, no one disagreed as to land value.

Now, in the condition that I am appraising this property, Fifth is one-way towards the freeway; Third

is one-way away from the freeway and Fourth Street is both directions, and that's going to be without any regard to any type of development, except commercial is going to be the better properties. The area closest to the freeway would be ideal for some sort of a department store or a bank. It would probably be equal to the bank sale if it were on the ordinary market. Ten dollars per square foot for a prime location with good access and visibility and plenty of parking is not an unusual figure in a town the size of Santa Rosa or my home over in Napa.

The low points are going to probably be for the residential construction off to where I am pointing on Sonoma Avenue.

There was a tower development that was done by private individuals for — I don't want to say for elderly, but a tower development of apartments in which the basis of valuation on the land was $2500 per unit. That was quite lower. There were no garage requirements, because the elderly people want to be in close where they can walk around and see. That was done, let's say, five years ago or longer. That $2500 per unit would probably lie in this area. Now, 500 square feet per unit seems a little small on land area, and it would indicate as high as five dollars, but probably no lower than two dollars and a half a square foot, regardless of the type of residential development in the form of apartments. I place the value, average value overall for the whole property within Phase II and III of five dollars a square foot for 30 acres. I didn't measure it and I understand that I took a piece out in the upper left-hand corner that is actually in the project, but I

was asked to leave it out because it wasn't part of the project sale to Mr. Hahn.

Assuming this to be 30 acres, that would indicate $6.5 million as the value of the property for fair market value as of December 1975.

Q Mr. Stahr, did you confirm the details of each sale that you have used as a comparable sale?

A Yes.

Q What did you use to determine the details?

A Well, myself or one of my staff contacted a buyer or a seller or a broker or an interested party. Some of them were a little difficult, because the buyers and sellers were not available, but each one was confirmed; many of them had been used previously.

Q Mr. Stahr, you have described the subject property and its surroundings from the point of view of what streets and developments are in. Would you describe the subject property generally in terms of what utilities are in?

A Well, all of the utilities are in the streets at this time. This was a functioning part of downtown Santa Rosa. The buildings were older and some of them had been seriously affected by the earthquake.

Q Have you read the redevelopment plan for the downtown Urban Renewal Area?

A Yes, I have been through it.

Q Have you read the amendments to the redevelopment plan which added the Phase III project area?

A Well, yes, I have read that, and with you, part of it, but specifically I would want to be able to read it before I answer questions.

Q As a result of your market study, have you

formed an opinion of the fair market value of the downtown Urban Renewal project for uses in accordance with the redevelopment plan?

MR. BRANDT: I object to that question, Your Honor. That doesn't go to any admissible, any issue which is not governed by the substantial evidence test.

MR. SMITH: I thought we had a running objection.

THE COURT: I am going to ask the reporter to repeat that question.

(Record read.)

THE COURT: I am going to overrule the objection and allow the witness to answer, but it's the understanding that the court will entertain a motion to strike and will not preclude you from making such a motion at a later time.

A Yes.

Q What is that value?

A $6.5 million.

THE COURT: I thought that was asked and answered already.

Q What does that come out to per square foot?

A Five dollars per square foot.

Q Could you again state the date of valuation if you haven't already?

A As of December 1975.

Q Now, in your opinion, can Phase II Urban Renewal Area be sold for development solely by private enterprise without any further government expenditure?

MR. BRANDT: I object to that question. I don't think you have established the witness' qualifications to ask it.

THE COURT: I want to hear the question read back. (Record read.)

MR. BRANDT: That presumes facts not in evidence and I don't understand it.

MR. SMITH: I don't know if I understand the question.

THE COURT: Do you understand the question?

THE WITNESS: I think he is asking me if it's salable, Your Honor.

THE COURT: Is that what you are asking, whether it's salable?

MR. SMITH: Perhaps I could rephrase the question. That's what I am asking him. Perhaps I could rephrase the question.

THE COURT: If that's what you are asking, he may answer the question. The question is is it salable, I assume.

Is that your understanding of the question?

THE WITNESS: Yes.

Q You may answer.

A Yes, it's salable.

Q and to be salable —

A May I make a qualification? I'm sorry.

Q Yes.

A I believe there is a building standing, I would like to see down, a hotel.

Q And is that in Phase II or Phase III?

A Phase II. With that exception —

Q In your opinion is the fair market value — strike that.

Does your opinion of fair market value depend upon the city or the Urban Renewal Agency making any

further expenditures of money in the Phase II or Phase III area?

A Nothing other than to tear down the old hotel.

Q In your opinion, Mr. Stahr, can the Phase III property be developed by private enterprise or be marketed?

A Yes.

MR. BRANDT: I object to that question, Your Honor.

THE COURT: Well, is that a motion to strike, then? Is that what that is? You were making a motion to strike?

MR. BRANDT: Yes. It's a motion to strike.

THE COURT: Well, you may make it, but maybe on a separate ground, counsel. I am willing to hear it.

MR. BRANDT: All right. I will reserve it. I will not make it to that particular question.

Q Well, in your opinion, Mr. Stahr, how could the Phase II Urban Renewal Area be marketed so as to achieve fair market value?

A Well, there are several ways. The simplest one would be an aggressive marketing program, parcel by parcel as they deemed fit under whatever controls they thought appropriate. A second way, which would make it probably easier, could be done under leasing the property, either in parcels or in total, and the lease could take, the money, the money could take the form of a percentage of the value or could even be entitlement to a percentage of the gross as the gross increases.

Q In your opinion, Mr. Stahr, if all of the parking lots and garages in the downtown parking district

were to become free parking, would that have a beneficial or a deterimental effect on downtown property?

A It would be benefited.

MR. BRANDT: I move to strike that.

THE COURT: And the basis for the motion?

MR. BRANDT: The basis for the motion is simply that counsel hasn't indicated that benefit pertains — to what he means by benefit. There is no foundation.

THE COURT: Well —

MR. BRANDT: He hasn't established the foundational fact.

THE COURT: I think it a pretty vague question. I don't know that the court can give much weight to it, because there is so little meaning that I can attach to such a vague question and answer it would really go to the weight, I think, counsel.

MR. SMITH: All right.

Q Mr. Stahr, you are familiar with the location of the Imperial Savings & Loan Association facility, are you not?

A That's correct.

Q And do you know whether or not the Imperial Savings & Loan facility is adjacent to a municipal parking garage?

A Yes, it is.

Q And do you know whether or not that municipal parking garage currently charges for parking?

A Yes, they do.

Q And if that municipal parking garage were to become free parking, would that affect the property value of Imperial Savings & Loan Association?

A Yes.

Q And what would be the effect on the property value of the Imperial Savings & Loan Association?

A Well, it would increase, it would be like decreasing the taxes. It would make it easier and more expeditious for people to patronize those buildings or those properties that are adjacent to the parking lot.

Q And you are familiar the Exchange Bank is located at the corner of Fourth and Mendocino, are you not?

A That's correct.

Q And that the Exchange Bank is located adjacent to the municipal parking lot?

A I am.

Q And you know that that municipal parking lot currently charges for parking; is that correct?

A It's metered, that's correct.

Q And if that municipal parking lot adjacent to the Exchange Bank were to become free parking, would that have an

EXHIBIT B

Tuesday, May 17, 1976, At 9 A.M.

THE COURT: Mr. Brandt?

MR. BRANDT: Your Honor, on reconsideration, we have no questions of this witness.

THE COURT: Very well. May this witness be excused?

MR. SMITH: Yes, he may, Your Honor.

THE COURT: Thank you. You are excused.

(Witness excused.)

MR. BRANDT: We do not move to strike his tes-

timony, Your Honor, but feel that it is irrelevant to those issues which we indicated yesterday and hope the court will duly consider our arguments on that point.

MR. SMITH: The plaintiffs will call Dr. Arthur Highman.

THE CLERK: Come forward here, please.

Will you raise your right hand, please. *ARTHUR HIGHMAN,* having been first duly sworn on oath by the clerk, testified as follows:

THE CLERK: And your name, please?

THE WITNESS: Arthur Highman.

THE CLERK: And how do you spell the last name?

THE WITNESS: H-i-g-h-m-a-n.

THE CLERK: Oh, thank you.

DIRECT EXAMINATION

Q (by Mr. Smith) Dr. Highman, would you please state your full name and address?

EXHIBIT C

57. The Court is unable to find or conclude from the evidence presented at trial that it is reasonably forseeable that the decisions contested in these cases will have a material financial effect, distinguishable from their effect on the public generally, on George Sutherland, Michael Panas, George Schmoll, or John Downey, or their employers or the corporations in which they own stock. On October 29, 1974, Agency member Sutherland's boss, Gary Hardisty, as President of the Downtown Development Association, appeared before the Urban Renewal Agency public hearing and spoke in favor of the Hahn shopping center,

and also presented a resolution of the Downtown Development Association supporting the shopping center. Hardisty's Housewares store, Imperial Savings and Loan Association, and the Exchange Bank, as downtown Santa Rosa businesses, are anticipated to benefit by the development of the shopping center in the urban renewal project.

58. The Court is unable to determine or conclude from the evidence presented at trial that any of the decisions contested in these cases would have been different but for the interests of George Sutherland, Michael Panas, George Schmoll, or John Downey, or their employers or the corporations in which they own stock.

59. The defendant City substantially complied with City Code Section 27.147 in connection with the preparation and publication of notice of completion of the EIR for the fiscal year 1975 Community Development Fund Block Grant Application.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. In rem jurisdiction over the matters sought to be determined in Action No. 79762 was completed on February 16, 1975.

2. In rem jurisdiction over the matters sought to be determined in Action No. 84237 was completed on February 14, 1976.

3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its

value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record.

4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the redevelopment project area for not less than its fair value for uses in accordance with the redevelopment plan.

5. No evidence was presented at trial from which the Court can find or conclude that the Agency has acted in excess of its authority in approving the Hahn Contract or in taking any other action relating to the redevelopment of the urban renewal project.

6. The City Council's finding that Phase III is a blighted area is supported by substantial evidence contained in the record. The City Council was required to make a finding that the Phase III redevelopment area is blighted within the meaning of the Community Redevelopment Law.

7. Neither the redevelopment plan as amended, nor the sale of the shopping center site to Hahn, nor the Hahn Contract constitutes a gift of public funds or a waste or misuse of public funds.

8. The addition of Phase III to the urban renewal project and the continued use of tax revenues from

Phase I allocated to the Agency pursuant to Article XVI, Section 16 of the California Constitution and the Community Redevelopment Law to pay the costs of redevelopment in Phase II and Phase III are lawful and authorized by the California Constitution and the Community Redevelopment Law, and do not constitute a waste or misuse of public money, a gift of public funds, or a violation of plaintiffs' rights under Article I, Section 1, 2, 11, 12 or 21 of the California Constitution, Article XIII, Section 25 of the California Constitution or any constitutional rights of plaintiffs.

9. The City Council's finding that the urban renewal project and the redevelopment plan, as amended, are in the interest of the public's health, safety and welfare and will effectuate the purposes and policy of the Community Redevelopment Law is supported by substantial evidence contained in the record.

10. Notwithstanding any resulting benefit to Hahn, neither the Hahn Contract nor the proposed expenditure of public funds for the urban renewal project violates plaintiffs' right to equal protection of the law under California Constitution Article I, Sections 11 and 12, nor their rights to life, liberty and property and to engage in a business under Article I, Section 1 of the California Constitution, nor the equal protection clause or due process clause of the Fourteenth Amendment of the United States Constitution, nor do the Hahn Contract or proposed expenditures constitute a monopoly, unlawful discrimination, an unfair practice, or unfair competition.

11. Neither the redevelopment plan as now amended, nor the Hahn Contract, nor any other con-

tract or action contested by plaintiffs, is a contract, combination, or conspiracy in restraint of trade, or an action in furtherance of a contract, combination or conspiracy in restraint of trade.

12. Phase I, Phase II and Phase III constitute a single redevelopment project under the California Community Redevelopment Law.

13. The Hahn shopping center, off-street parking facilities and other public improvements, and the street closures of the Phase II amendment are not inconsistent with the Santa Rosa General

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is supported by substantial evidence contained in the record and was not an abuse of discretion.

28. The urban renewal project EIR was completed in compliance with the California Environmental Quality Act.

29. The application EIR was completed in compliance with the California Environmental Quality Act.

30. Plaintiffs' Eleventh Cause of Action in Action No. 79762, which alleges that proposed financing of the urban renewal project violates the State Constitution and state law, is premature.

31. No evidence was present at trial which suggests the conclusion that plaintiffs are barred by the doctrine of laches, or unclean hands, or for failure to exhaust their administrative remedies from bringing any of the causes of action set forth in these consolidated cases.

32. None of the plaintiffs' claims are barred by the doctrine of res judicata or collateral estoppel.

33. Plaintiffs have standing to sue and have an interest in the redevelopment activities complained of as taxpayers under Code of Civil Procedure Section 526a and are interested persons under Code of Civil Procedure Section 863.

34. Concerning the environmental impact reports, the Court has applied the substantial evidence, and in addition thereto, has independently determined from the record of the entire proceeding before defendants and the evidence presented that the environmental impact reports are adequate. Concerning the other findings required to be made by defendants, the Court has applied the substantial evidence test only and has made no independent determination.

35. Ordinance No. 1741 is legal and valid.

36. Ordinance No. 1791 is legal and valid.

37. The activities of defendants contested in this action, including, without limitation, the amendments to the project

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814. On October 22, 1976, I served the within REPLY OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and SECOND AFFIDAVIT OF RICHARD E. BRANDT IN

SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

Mr. William M. Brinton, Esq.
Mr. Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
Alcoa Building, Suite 1400
One Maritime Plaza
San Francisco, California 94111

Mr. James L. Browning, Jr.
United States Attorney
Mr. Paul E. Locke
Assistant United States Attorney
P.O. Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Mr. William N. Willens
Barrett, Stearns, Collins, Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrance, California 90503

I, Mary M. Miller, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 1976, at Sacramento, California.

Mary M. Miller

WILLIAM M. BRINTON
RICARDO J. HECHT
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Telephone: (415) 397-4600
Attorneys for Plaintiff

United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND TO MOTION TO DISMISS

I

PRELIMINARY STATEMENT

The purpose of this supplemental brief is to establish, *inter alia,* that the allegations of Plaintiff's claim entitle it to injunctive relief, including the kind of injunctive relief prescribed by Section 16 of the Clayton Act (15 U.S.C. 26). To this end, we will show that defendants' scheme for the creation of a massive regional shopping center in Santa Rosa is *per se* violative of Sections 1 and 2 of the Sherman Act, because it is

intrinsically monopolistic, and that this scheme or conspiracy threatens "loss or damage" to Plaintiff and to some of its inhabitants, property owners and taxpayers. From these premises will follow the conclusion that Plaintiff is "entitled to sue for and have injunctive relief" pursuant to said Secton 16 of the Clayton Act in accord with doctrine of the following cases:

> *Bratcher* v. *Akron Board of Realtors,* 381 F.2d 723, 724 (6 Cir. 1967).[1]
>
> *State of California* v. *Automobile Manufacturers Association*, 481 F.2d 122, 130-131 (9 Cir. 1973).[2]
>
> *State of Washington* v. *Automobile Manufacturers Association,* 538 F.2d 231, 235-237 (9 Cir. 1976).

II

ARGUMENT

Excess Capacity, a Monopolistic Tool.

At the hearing of defendants' motion we stated, in effect, that defendants were violating the Sherman Act by means of "excess capacity," and that this entitled Plaintiff to the preventive relief provided by Section 16 of the Clayton Act.

In this connection, it might be noted that economists point to excess capacity as indicative of monopoly

[1] "The Department of Justice has intervened in this court as amicus curiae on behalf of the appellants, arguing that the complaint states a claim upon which relief can be granted under the antitrust laws" (p. 724).

[2] " . . . cities . . . might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants" (p. 131).

power,[3] and that our courts view it as a means of effectively anticipating and forestalling all competition.[4]

Our statement was not an improvisation and that this is so is borne out by some of the allegations set forth in Plaintiff's complaint, filed on *November 19, 1974*. These allegations may be summarized in relevant part as follows:

> Santa Rosa is located some seven (7) miles north of Rohnert Park. Rohnert Park has designated certain property within its boundaries as a site for a regional shopping center (Complaint, p. 3, lines 20-31).
>
> There is currently in the Rohnert Park area a demand for approximately 627,000 square feet of retail space. There are developers who are ready, willing and able to supply this demand, but they are inhibited from so doing by the threat of a competing center planned by defendant Agency (Complaint, p. 4, lines 21-27).
>
> Defendant Agency has entered into an agreement with defendant Developer, with the consent of defendant HUD, to develop a competing shopping center on a thirty-two (32) acre site in downtown Santa Rosa (Complaint, p. 5, lines 6-12; p. 6, lines 24-26).
>
> There are presently approximately 748,000 square feet of general merchandise space available in Santa Rosa. Under the terms of said agreement defendant Developer will construct an additional 438,000 square feet of general merchandise space, thus increasing the total of such space in Santa Rosa to 1,186,000 square feet. Under the terms of said

[3] E.g. M. A. Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1297-1298 (1948).

[4] *United States* v. *Aluminum Co. of America,* 148 F2d 416, 430-431 (2 Cir. 1945); Atty. Gen. Nat. Com. Rep. 56-60 (1955).

> agreement defendant Developer will also build 322,000 square feet of other retail space in the proposed shopping center site. "*The excess retail space capacity to be so created will not be absorbed by the demand therefor until some time after the year 1980.*"[5] Hence this project will render noncompetitive and impractical any project for a retail center in the proximity of Santa Rosa (Complaint, p. 9, lines 18-30).[6]

It is apparent from the above summarized allegations that under the agreement between the defendant Agency and the defendant Developer, the existing retail sale space in Santa Rosa is to be almost *doubled,* and this is confirmed by admissions made by the defendants who are parties to the agreement. In their answer the Santa Rosa defendants admit that there are 748,000 square feet of general merchandise space in Santa Rosa, and that under the defendant Developer's proposal there will be built approximately 703,000 square feet of general merchandise and retail space (Santa Rosa defendants' answer, p. 8, lines 13-16). On the other hand, defendant Developer admits in its answer that the land disposition agreement requires it to "construct a shopping center containing approximately 713,500 square feet of retail space" (Defendant Developer's answer, p. 6, line 3, to p. 7, line 1).

While Plaintiff alleges in its complaint that the additional retail space to be so built "will not be *absorbed*

[5] All emphasis added to quoted material is supplied by us, unless otherwise indicated.

[6] Plaintiff's allegations above summarized have not been "pierced" by affidavits or other materials upon which motions for summary judgment may be grounded, and hence Plaintiff may *rest upon them* to establish that it has a valid claim for relief.

until some time after *1980,*" defendant HUD asserts "that the fully occupied shopping center should be able to *absorb* most of the needed growth of commercial space in Santa Rosa *until* about *1990.*"[7]

These facts would seem to indicate that those involved in the project are about to invest millions in retail space that will not be usefully employed for a period of between five (5) to ten (10) years, and that someone will have to pay the upkeep of this excess capacity for a similar period. Applying the standard care of the "ordinary reasonably prudent man"[8] to those so involved, it would appear that they are embarking on a most reckless course of conduct.

The proposed shopping center is not a civic nonprofit operation. It is instead a commercial enterprise to be owned and operated by a multibillion dollar consortium consisting of Sears, Macy and defendant Developer,[9] and this being so one might inquire why these extremely succcessful entrepreneurs are about to engage in such seemingly unwise course. The answer to such an inquiry is that experience, logic and the law teach that this is but an initial move in a plan or scheme which, carried out, will result in a monopoly.

This becomes clear when one considers that there is nothing in the record of this case that validly explains why this excess of capacity is necessary to the development of the business of the consortium. Absent such an explanation, one must conclude that the consortium

[7] E.I.S., Daugherty depo., Ex. 1, p. 114.

[8] Such a standard is applicable in antitrust. *Nash* v. *United States,* 229 U.S. 373, 376-378, 57 L.Ed. 1232.

[9] Hahn depo., pp. 12-14; 18-20.

is acting with calculation to head off every attempt by others to supply any part of the demand for retail space in the area. Thus we have seen at least one abortive attempt to enter this field in connection with the frustrated development of Plaintiff's regional shopping center site. Certainly, no "ordinary reasonably prudent" developer would choose to place itself in a collision course with Hahn-Macy-Sears Juggernaut particularly when it is evident that it enjoys the wholehearted and concerted support of HUD and defendant Agency. It is therefore plain that the combination constituting this group has sought and obtained full control of the retail space market in the Santa Rosa Trade Area in violation of the Sherman Act, and for this reason the following taken from the opinion of Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 430-431 (2 Cir. 1945) is entirely applicable herein:

> " . . . There were at least one or two abortive attempts to enter the industry, but 'Alcoa' effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. There is no dispute as to this; 'Alcoa' avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a

> market. It seems to us that that question scarcely survives its statement. *It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face very new comer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.* Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent."

The powerful combination that has thus been so carefully and painstakingly put together may be fairly described as the "extraordinary reasonably prudent" monopolist, and hence this additional remark by Judge Learned Hand becomes especially apt here:

> " . . . In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. *To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing.* So here, 'Alcoa' meant to keep, and did keep, *that complete and exclusive hold* upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within §2, it must be reversed." (148 F.2d 432).

So, we have here demonstrably a "current ongoing conspiracy" prohibited by the Sherman Act whose objective is to monopolize a substantial portion of the new general retail merchandise space needed to supply the existing and future demand therefor in the Santa Rosa Trade Area.

This combination is in fact attempting to "run a corner" on the new general retail merchandise space in the Santa Rosa Trade Area. The necessary and unavoidable result of this act is to *compel* any merchant desiring to engage in the retail trade in this area to rent the space it needs for the storage, display and sale of its goods from the combination on terms and rents entirely within the control of the combination. *An aggravating and unnatural feature which is disclosed here by the record is that these merchants will be in effect the tenants of their competitors, i.e., Macy and Sears*.[10] The rents and terms that can thus be imposed by the combine can in turn artificially affect the price of goods to be sold, thereby hampering the public in satisfying its needs and tastes. The goods whose prices would be so affected concededly move in the channels of interstate commerce, and accordingly the Court has before it an anticompetitive situation which is *per se* violative of the Sherman Act (*United States* v. *Patten*, 222 U.S. 525, 541-543, 57 L.Ed. 333 (1913).)

Plaintiff is Entitled to Relief Under Section 16 of the Clayton Act, Even Though the Harms Suffered By It May be Unrelated to Competition

That a regional shopping center with the abundance

[10] Hahn depo. pp. 18-20.

of excess retail capacity planned for the Santa Rosa regional shopping center has the power to threaten and inflict great economic loss and injury to commercial developments in all neighboring communities, including Plaintiff, has from the beginning been *well within the contemplation of those engaged in planning it*. Thus we find the following in a report rendered to defendant Agency by one of its appraisers:

> "*The prompt development of the Santa Rosa center will be a strong inhibitor of the development of any new center in the region.* While the proposed Rohnert Park center is premature and not a serious possibility at this time, *the actuality of the subject center would kill off any possibility of a major development in Rohnert Park for a long time to come.*"[11]

This unrepudiated and voluntary confession manifests a clear intent to smother any competing commercial development in the cradle.

This intent so blatantly expressed threatens "loss or damage" as follows:

(a) To Plaintiff, in its proprietary capacity, as owner of property within the commercial area;

(b) To those persons and entities who own property within the commercial area, and whom Plaintiff represents as agent and trustee in connection with the development of the area;

(c) To Plaintiff as a community, in that defendants' conduct limits the opportunities of its inhabitants as a whole, retards its development, and relegates it to an inferior economic position

[11] Burns's depo., Ex. 30, Ratcliff's appraisal, p. 24.

vis-à-vis Santa Rosa.

Hence, even though the harms suffered by Plaintiff and the community it represents may be "unrelated to competition" it is entitled to relief under Section 16 of the Clayton Act, because that relief will serve here to enjoin an ongoing conspiracy to violate the Sherman Act. In support of this proposition we quote the following excerpts from the opinion in *State of Washington* v. *Automobile Manufacturers Association,* supra:

> "Appellants are correct in arguing that §16 may provide for relief for purposes other than restoring competition. In *Georgia* v. *Pennsylvania R. Co.,* 1945, 324 U.S. 439, 446-53, 65 S.Ct. 716, 89 L.Ed.1051, the Court held that the State of Georgia could seek relief under §16 to enjoin northern railroad companies from conspiring to fix discriminatory railroad rates to the detriment of Georgia's economy. Georgia did not seek the injunction in order to restore competition among the railroads; rather, the purpose was to terminate the conspiracy and eliminate its results, thus improving the economic conditions of the state and its citizens. Similarly, the Sixth Circuit has held that a conspiracy by a board of realtors to exclude Blacks from purchasing homes in certain areas may be enjoined under §16. An effect of an injunction would be to further civil rights policy, but the complaint charged impediments to the flow in interstate commerce of persons, mortgage financing and building materials. *Bratcher* v. *Akron Area Board of Realtors,* 6 Cir., 1967, 381 F.2d 723. In those cases the injunctions were directed against a current ongoing conspiracy. Thus, the cases stand only for the proposition that §16 provides relief which may have effects other than restoring competition *when that relief has the effect of ending an ongoing antitrust violation,* one of the functions of the antitrust laws." (538 F.2d 235, footnote omitted.)

. . . . . .

> "The omission of the words 'business or property' in §16 certainly makes that section 'far broader that §4.' *Hawaii* v. *Standard Oil Co.,* 9 Cir., 1970, 431 F.2d 1282, 1284, *aff'd,* 1972, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184. It does not follow that when Congress adopted §16 it intended to permit remedies which would serve none of the purposes for which the law was passed. Plaintiffs who have not been injured in their business or property, *do have standing under §16 to seek injunctive relief designed to prevent harms which may be unrelated to competition, but only when that relief serves the antitrust function of ending an ongoing violation. . . . .*" (538 F.2d 237.)

Plaintiff is entitled to preventive relief not only under Section 16, but also pursuant to *Data Processing Service* v. *Camp,* 397 U.S. 150, 25 L.Ed. 184 (1970).

Respectfully submitted,

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

CERTIFICATE OF SERVICE
BY MAIL

I, the undersigned, RICARDO J. HECHT, one of the attorneys for the Plaintiff in the above-entitled action, hereby certify that I have served copies of the foregoing "Plaintiff's Supplemental Brief in Opposition to Motions for Summary Judgment and to Motion to Dismiss" on the attorneys for the defendants by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to said attorneys at their respective addresses which addresses are the last addresses of said attorneys known to me.

Dated: November 8, 1976.

RICARDO J. HECHT

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Develoment, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANTS, CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

I

PRELIMINARY STATEMENT

Plaintiff City of Rohnert Park seeks to enjoin the Defendants the Secretary of Department of Housing and Urban Development ("HUD"), the City of Santa Rosa and its Urban Renewal Agency (the "Santa Rosa

Defendants"), and Ernest W. Hahn, Inc. ("Hahn"), from proceeding with the development of a regional shopping center in the Santa Rosa Center Urban Renewal Project on the ground that the proposed development allegedly violates Sections 1 and 2 of the Sherman Act (15 U.C.C., Sections 1 and 2). Plaintiff claims it is entitled to sue for such relief under Section 16 of the Clayton Act (15 U.S.C., Section 26).

The purpose of this supplemental brief is to explain why the facts as set forth in the affidavits submitted to the Court raise no genuine issue of material fact as to either the charge of violation of the Sherman Act or the Plaintiff's claimed entitlement to sue.

In opposing the Defendants' motions for summary judgment, Plaintiff has the burden of producing evidence which, viewed most favorably to Plaintiff, would permit the inference that Defendants have violated the Sherman Act and the Plaintiff has been injured by the violation. Plaintiff cannot rest its opposition on the allegations of the Complaint. (*Modern Home Institute, Inc.* v. *Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975); *Scranton Construction Co., Inc.* v. *Litton Industries Leasing Corp.*, 494 F.2d 778 (5th Cir. 1974); *cert. denied* 95 S. Ct. 774, 419 U.S. 1105, 42 L.Ed. 2 800.

The City of Rohnert Park's opposition to the motions is inadequate because it fails to present sufficient facts to support inference that it has been injured or an inference of two factual premises essential to its antitrust claims, *i.e.*, (1) that Santa Rosa redevelopment will result in a competitive advantage for Hahn and its proposed shopping center, and (2) that the Santa Rosa

shopping center will create an excess of available retail space. Even accepting the factual conclusions of the complaint as true, Plaintiff's antitrust claim is without merit because it alleges, at most, only the creation of a competitive advantage for Hahn as an incident of governmental action. As the Santa Rosa Defendants have explained in detail in their earlier brief, government action creating such a competitive advantage does not violate the antitrust laws.

No facts before the Court allow the insinuation that repeated construction of excess retail space is being used as a tool to maintain an existing monopoly. Neither Hahn nor its prospective tenants, Sears and Macys, has a monopoly of retail facilities in the suggested relevant market; and the redevelopment proposal is to build a single shopping center, not to undertake a continuing plan for construction of retail facilities. Plaintiff has not alleged or pleaded the use of any exclusionary market device condemned by the Sherman Act. Absent use of such a prohibited exclusionary device by Defendants, no Sherman Act violations can be established on the facts alleged even if real estate developers and retailers are inhibited by lack of demand from developing a shopping center in Rohnert Park. Finally, Plaintiff has failed to plead or present facts that might establish that it is entitled to sue. Plaintiff cannot sue for injury to its citizens, inhabitants or property owners because only states and the federal government can sue as *parens patriae*. Plaintiff must sue, if at all, in a proprietary capacity. Here Rohnert Park has no standing to sue in such capacity because it has not pleaded or presented facts

showing loss or damage suffered as owner of the library site which is the only property it owns in the commercial area allegedly affected by Santa Rosa development.

II

Argument

A. PLAINTIFF HAS FAILED TO ALLEGE OR PRESENT FACTS SUFFICIENT TO SUPPORT ITS CLAIM THAT DEFENDANTS' ACTIONS VIOLATE SECTION 1 OR SECTION 2 OF THE SHERMAN ACT.

Plaintiff's antitrust claim is predicated on two factual contentions: (1) that the proposed shopping center of Hahn will create a surplus of retail sales space in Sonoma County and that Hahn, apparently by purchasing land at a price allegedly below fair value, will have a competitive advantage that will inhibit potential developers and retailers from developing a shopping center site in the City of Rohnert Park. These two factual contentions are disproved by unrefuted facts before the Court.

The fallacy of Plaintiff's inadequate land price premise is apparent from the explanation of the public financing of the project set forth in the affidavits of Mr. Burns and Mr. Fitzhugh. Phases I and II of the Santa Rosa project are federally assisted pursuant to a loan and grant contract between the Urban Renewal Agency and HUD. By the contract, the federal government grants or guarantees loans to the Agency for the costs of redevelopment. The federal government also bears three-fourths of the net project costs. Net project costs are computed by subtracting the proceeds

from the Agency's land sales from the costs of acquiring and clearing the land, relocating residents and businesses, and administering the redevelopment program. The Agency may contribute its one-fourth of the net costs either in cash or by in-kind grants in aid. The latter category of local contribution includes credit for the costs of constructing public facilities that serve the project.

The statutory formula for sharing public costs between federal and local governments creates conflicting fiscal interests. In the absence of contrary federal restrictions, the local government could increase the specified federal contribution to the project by the simple expedient of giving away land or selling it at a deflated price. Assuming a constant total public cost, for each dollar reduction in the sale price of land the federal government must contribute an additional seventy-five cents to the project (three-fourths of the resulting $1 increase in "net" cost). The local agency may receive consideration from the developer for such a decrease in the land sale price by having the developer bear a disproportionate share of the costs of public improvements. If these public improvements qualify as local grants in aid, each dollar of disposition contract consideration transferred from land price to public improvement construction cost increases the federal share of the public costs by one dollar and decreases the local share of public costs by one dollar.

The foregoing aspects of the project financing are critical to analysis of the Plaintiff's antitrust claims and the other issues purportedly raised by this suit. The requirements of federal law and regulations that

the Agency obtain at least two appraisals from independent appraisers for each land sale, that the sale price be not less than the fair value for uses in accordance with the redevelopment plan, and that HUD approve all dispositions are obviously intended to protect the federal government from local government attempts to shift the burden of public costs by reducing land prices while requiring disproportionate developer contributions to public improvement costs. Contrary to Plaintiff's antitrust theory, land price is wholly meaningless as a measure of the adequacy of the consideration paid by the developer and as an indication of the competitive advantage or disadvantage to the developer arising from a redevelopment project land disposition.

The only rational measure of competitive advantage or disadvantage of Hahn *vis-a-vis* other real estate developers is total cost of development, not simply one isolated element of cost, such as land price. By the contract for disposition of the land in the urban renewal project, Hahn will pay $2,000,000 for the land in Phase II, and, depending on the contract alternative selected in the sole discretion of the Agency, will pay $1,000,000 for the Phase III land, contribute between $5,500,000 and $7,500,000 towards the construction of parking facilities to be dedicated to public use, pay $401,000.00 per year in lieu of parking district assessments, pay various other fees and public costs, and develop the site in compliance with plans approved by the Agency.

The only facts before the Court concerning the adequacy of this total contract consideration of Hahn is

the testimony of Mr. Hahn at the public hearings on the shopping center proposal (see pp. 8-9 of Defendants' Response to Plaintiff's Brief in Opposition to Motions) and at his deposition. This evidence shows that every other disposition contract of the Hahn Company is either more favorable to Hahn, or at least as favorable to Hahn, as the disposition contract for the land in the Santa Rosa project. (Hahn Depo., pp. 36-42.) Hahn is paying approximately $6,000,000 more for the opportunity to develop in downtown Santa Rosa than he would be required to pay for the opportunity to develop in a suburban area, such as the Rohnert Park site. (Burns Affidavit, Exhibit A, Transcript 10/29/74, pp. 12-15.) Since the only evidence before the Court is contrary to Plaintiff's competitive advantage premise, the Defendants are entitled to summary judgment without regard to the merit or lack of merit of Plaintiff's legal theory.

The second factual premise of Plaintiff's theory that is contradicted by the evidence without response from Plaintiff is the allegation that the Santa Rosa shopping center will create an excess of retail store space. Plaintiff asserts (Complaint, p. 9, lines 18-30) that the retail space of the proposed center will not be absorbed by the demand therefor until sometime after 1980. The facts set forth in the two affidavits of James K. Burns submitted in support of these motions indicate that land acquisition has not yet begun for Phase III, which is an integral part of the shopping center site. Considering the requirements of acquisition, clearing, relocation and construction, it is apparent that even if demand to 1980 will be absorbed, the time, if any, be-

tween availability of the shopping facility and demand for the entire retail space constructed will be of minimal duration.

The proposed Santa Rosa regional center will involve the construction of slightly more than 700,000 square feet of retail space (Plaintiff's Supplemental Brief, p. 4), and eliminate the 72,000 square feet of the existing Sears store. Plaintiff's contention that potential developers and retailers in Rohnert Park will be injured by development in Santa Rosa can be true only if Rohnert Park and Santa Rosa are part of a single market. Plaintiff alleges (Complaint, p. 4, lines 21-27) that two years ago, at the time of the filing of the Complaint, a demand for 627,000 square feet of retail space existed in Rohnert Park alone. On the basis of Plaintiff's own allegations, the Santa Rosa shopping center will provide only enough retail space to replace the old Sears store and satisfy the demand to the extent it existed two years ago in a subpart of the market. The shopping center study (Affidavit of Burns, Exhibit C, "Appendix E, Volume III — EIR"), the only evidence before the Court relating to demand for retail space, shows that unsatisfied *department store* demand alone totaled 600,000 square feet in 1975 and was predicted to reach 783,000 square feet by 1980. No facts presented to the Court show, or tend to show, any excess capacity that might inhibit the development of retail sales capacity in the City of Rohnert Park for current demand not satisfied by a Santa Rosa facility or future demand in the area.

Even assuming factual support could be found for the Plaintiff's excess capacity theory, the theory itself,

as a matter of law, fails to state a claim based on the Sherman Act. The only case cited by Plaintiff for the proposition that "excess capacity" is germane to application of the antitrust law is *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) ("Alcoa"). The defendant in the Alcoa case controlled more than 90% of the virgin ingot aluminum manufacturing in the United States and forestalled the one or two abortive attempts of others to enter the industry by expanding its capacity to meet anticipated future demand. The question presented to the Court and resolved against Alcoa was whether notwithstanding Alcoa's monopoly position it was entitled to the protection of the "thrust upon" monopoly defense considering its calculated expansion of production facilities to forestall competition from newcomers to the market who might otherwise serve or satisfy increased future demand.

The mere statement of the facts of the Alcoa case refutes the suggestion that it is applicable in the circumstances of shopping center development in Sonoma County. Hahn does not have a monopoly of shopping centers in Sonoma County. It does not own any such centers and is not involved in developing any in the County except the downtown center. Macys presently owns no department store in the area; if the development is completed, Sears will still own only a single store in the area. The defendants in this action do not rely on the protection of a "thrust upon" defense to the charge of monopoly. The undisputed facts show that neither Hahn nor the anticipated department store tenants of the Santa Rosa shopping center now have,

nor will have, a monopoly in real estate development, shopping center ownership, or retail trade in Sonoma County or any relevant market.

Apart from the monopoly allegations, Plaintiff's antitrust claim reduces to an argument that Hahn competitors will be inhibited by competition. There is no suggestion in the Complaint or in any facts presented to the Court that Hahn will be able to attract tenants except by the normal means of competition, by lowering prices and offering better services. The market sufficient to sustain only one regional shopping center, depicted in the Complaint, resembles the market considered in *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 284 F.2d 582 (1st Cir. 1960). In *Union Leader,* the Court, after noting that the town of Haverhill, Massachusetts could support only one daily newspaper and might be termed a natural monopoly, indicated that either of two competing newspapers in that town could vigorously pursue their own interests even though the natural consequence of the acts of competition of each would be to drive the other newspaper from the market. The Court applied the Sherman Act as follows:

> "It was a foregone conclusion that if successful the Journal would eventually drive the Gazette out of business, and, naturally, Union Leader proposed to succeed. But intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of section 2. In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. (284 F.2d 582, 584 (1960).)

In *Bailey's Bakery, Ltd.* v. *Continental Baking Co.,* 235 F.Supp. 705 (9th Cir. 1964), the Ninth Circuit faced a similar natural monopoly market with respect to the sale of bread in Honolulu. The Court reiterated that a monopoly resulting from nonpredatory and essentially fair competitive practices is not condemned by the Sherman Act. The Court stated:

> "What is condemned its (sic) growth by business methods designed for and having the effect of impeding new entry into the market, or excluding those whose occupancy is already precarious, by recognizably exclusionary devices. Competing fairly and aggressively, regardless of the consequences to one's rivals is not condemned. (235 F.Supp. 705, 718 (1974).)

The lesson of the *Union Leader* and *Bailey's Bakery* cases is that fair and vigorous competition that leads to a monopoly or inhibits or excludes all but a single competitor from the market is not condemned by the Sherman Act. It is condemned only if it is accomplished or maintained by "recognized exclusionary devices" prohibited by the act. Indulging in every inference and presumption in favor of Plaintiff, the most that has been alleged by this Complaint is that only one regional shopping center can be supported by the demand of Sonoma County and the Hahn center proposed for downtown Santa Rosa will be that shopping center because of a competitive advantage derived from the government redevelopment programs. This restatement of the allegation shows that the analysis of the case must ultimately return to those decisions,

such as *Gibson & Perrin Co.* v. *City of Cincinnati,* 480 F.2d 936 (1973), which hold that incidental benefits from government activities are not violative of the Sherman Act. The incidental competitive advantage to Hahn from redevelopment is not a "recognized exclusionary device" and cannot be the basis of a Sherman Act claim even if the result is the consequence alleged in the complaint.

B. PLAINTIFF LACKS STANDING TO SUE UNDER SECTION 16 OF THE CLAYTON ACT.

To establish standing under Section 16 of the Clayton Act (15 U.S.C., Section 26), the City of Rohnert Park must show, first, that the Defendants have violated the antitrust laws, and second, that the Plaintiff is threatened with loss or damage as a result of the violation. *Gomberg* v. *Midvale Co.,* 157 F. Supp. 132 (D.C. Pa. 1955). For the reasons set forth in the immediately preceding section, Plaintiff cannot show the first prerequisite: violation of the law. Plaintiff has also failed to show any loss or damage cognizable under Section 16.

The complaint alleges that the City of Rohnert Park owns land at the site zoned for regional shopping center within its jurisdiction. Testimony of the City Manager, Mr. Callinan, in his deposition indicates that that land is in fact a library site donated to the City by Codding Enterprises. (Affidavit of Joseph E. Coomes, Jr., Exhibit A and Exhibit B). The Plaintiff is not engaged in real estate development, in retail sales, or in land speculation. The only nexus between the City of Rohnert Park and the land held for commercial development in the so-called regional shopping center site in Rohnert Park is that the Plaintiff, in its governmental capacity, has formed assessment districts and cooperated in the construction of public improvements in contemplation of future development. No facts presented or alleged suggest that the City of Rohnert Park has a proprietary interest in any property in its jurisdiction except property held for public use.

Plaintiff asserts an entitlement to standing under Section 16 on the basis of *State of Washington* v. *Automobile Manufacturers Association,* 538 F.2d 231 (9th Cir. 1976), which indicates that Section 16 may provide relief for purposes other than restoring competition when the relief has the effect of ending an ongoing antitrust violation. However, Plaintiff's argument overlooks that, as a prerequisite of standing, Section 16 also requires "loss or damage" cognizable in courts of equity. *In re Multidistrict Vehicle Air Pollution MDL No. 31,* 481 F.2d 122 (9th Cir. 1973), discusses in detail the prerequisites for standing under Section 16 and states that injury to the public may be the subject of relief sought by the United States Government or a state government as *parens patriae,* but as to other political entities, a different rule applies:

> "On the other hand, political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae,* although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." (481 F.2d 122, 131 (1973).)

The *Multidistrict Vehicle Air Pollution* case dictates

that a suit by Rohnert Park in its role as a government to protect the interests of its citizens cannot be entertained even if it only seeks injunctive relief under Section 16. This holding requires rejection of the argument that Plaintiff can sue to protect the persons and entities who own property within the Rohnert Park Regional Shopping Center site, or for its inhabitants as a whole. (Plaintiff's Supplemental Brief, p. 8(b), (c).) As to Plaintiff's other claimed basis for suit — its ownership of the library site within the commercial area (Supplemental Brief, p. 8(a)) — no standing to sue has been shown because the proprietary interest in a library site is not a proprietary interests "congruent" with the proprietary interest of those real estate owners and developers or potential real estate owners and developers who might develop commercial and business facilities in the Plaintiff City. No facts are alleged or presented to the Court which show the possibility of loss, damage or injury to the Plaintiff's library site proprietary interest.

Plaintiff lacks standing to sue under Section 16 because the only injury alleged in the Complaint, or suggested in Plaintiff's arguments, is a general economic injury to the citizens and inhabitants of the City of Rohnert Park. No legal authority has been offered for the proposition that law or equity will afford any relief for such a remote economic injury except where standing is conferred to a government *in parens patriae*.

Dated: November 18, 1976.

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants Urban Renewal Agency of the City of Santa Rosa and the City of Santa Rosa

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California, 95814. On November 18, 1976, I served the within SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

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I, Sandra Hosking, declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 1976, at Sacramento, California.

Sandra Hosking

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United States Court of Appeals
For the Ninth Circuit
Civil Action No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

OPENING BRIEF OF PLAINTIFF-APPELLANT IN APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

Honorable William W. Schwarzer

* * * * * * *

STATEMENT OF FACTS RELEVANT TO THE ISSUES

Within the boundaries of Appellant, there is an area designated for commercial development. This area consists of about forty-five (45) assessor's parcels owned and assessed to seventeen (17) persons.[3] Appel-

[3] R.L. Brust Affidavit, Exhibit A (R. 1018).

lant owns two of said parcels, and its property is either available for commercial uses "or is zoned for commercial uses.[4] Over a period of approximately twenty (20) years, in excess of a million ($1,000,000) was spent under Appellant's direction for street construction, sewers, water mains, drainage and other improvements necessary to make the entire site suitable for commercial development. Most of the funds required to defray the cost of these improvements was raised by special assessments levied on the several owners of the property, and this was done pursuant to the Improvement Bond Acts of 1911 and 1915.[5] Altogether these assessments aggregated the sum of approximately $1,030,000.[6]

The bonds issued to raise the money used for the improvements are by virtue of the provisions of the Improvement Bond Acts of 1911 and 1915 payable exclusively from a *fund* created by the payment of the special assessments levied on the owners and their respective properties, and Appellant as well as any other issuer similarly situated is not liable for their payment (25 Cal.Jur.2d, Highways and Streets, Sec. 330, pp. 237-238). This is consistent with the generally accepted notion that when a city engages in the construction of improvements for the benefit of private property it is acting primarily in its *proprietary* capacity, and that money raised and disbursed for the purpose is not "public money," but constitutes "trust funds" held and spent by the city for the benefit of the individual

[4] Callinan Deposition, Vol. I, pp. 39-40.
[5] Callinan Deposition, Vol. I, pp. 40-43, Vol. II, p. 39.
[6] See Fn. 3, supra (R. 1020-1022).

owner (*City of Seattle* v. *Stirrat* (1909) 55 Wash. 560, 104 Pac. 834, 836-837). We submit, therefore, that Appellant in its capacity as *agent*, *representative* and *trustee* of its property owners, and as custodian and guardian of the collective rights of its inhabitants, has *standing* to bring this equitable suit to enjoin Appellees' unlawful conduct thereby rendering unnecessary a *multiplicity* of such suits (*Muncie National Gas Co.* v. *City of Muncie* (1903), 160 Ind. 97, 66 N.E. 436, 441; *City of Saint Mary's* v. *Hope Natural Gas Co.* (1913), 71 W.Va. 76, 76 S.E. 841; *City of Lansoure* v. *Lasell* (1914), 26 N.D.638, 145 N.W. 577, 578; *City of Saginaw* v. *Consumers Power Co.* (Mich. 1921), 182 N.W. 146, 154; 64 C.J.S., Municipal Corporations, Sec. 2190, p. 1032; 56 AmJur.2d, Municipal Corporations, Etc., Sec. 16, pp. 81-82; McQuillen, Municipal Corporations, Sec. 49.57, pp. 302-303).

Moreover, the interests of Appellant and its inhabitants coincide harmoniously with those of its property owners. Consideration of the nature and administration of the California retail sales tax (*City of San Joaquin* v. *State Board of Equalization* (1970) 9 C.A.3d 365, 370-371), makes it evident that a heavy concentration of retail merchandising business in Appellee City will enhance the retail sales tax revenues of that city, while diminishing those to which Appellant might otherwise be entitled, and as a consequence Appellant is threatened by the conduct of Appellees with a loss of revenues which it could use either directly or indirectly for the benefit or relief of its inhabitants. Also, Appellant is the proprietor of property within its commercial area which is likewise threatened with financial loss should Appellees' scheme succeed. Accordingly, in this case, as in other cases involving cities, and the antitrust statutes (*Chattanooga Foundry & Pipe Works* v. *City of Atlanta* (1906), 203 U.S. 390, 395-396, 51 L.Ed. 240, 243-244), it can be said that Appellant has standing to *sue* to vindicate such of its *"own proprietary interests"* as are *"congruent with the interests of"* its "inhabitants" [*State of California* v. *Automobile Manufacturers Association, Inc.*, supra, 481 F.2d 122, 130-131 (1973)].

Appellant, it may be argued, is here seeking relief which is *unrelated to competition*, but even if this be so, it has *standing to sue* under Section 16 of the Clayton Act, because the relief it seeks *"serves the antitrust function of ending an ongoing violation"* of the Sherman Act (*State of Washington* v. *Automobile Manufacturers Association*, supra, 538 F.2d 213, 237).

* * * * * * *

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United States Court of Appeals
for the Ninth Circuit

Civil Action No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees

RESPONSE TO REQUEST BY APPELLANT FOR JUDICIAL NOTICE AND REQUEST BY APPELLEE FOR JUDICIAL NOTICE

Appellees City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (the "Santa Rosa defendants") hereby respond to the request by Appellant for Judicial Notice and respectfully request this Court to take judicial notice of the matters set forth below pursuant to the provisions of Section 201(d), Federal Rules of Evidence:

RESPONSE TO REQUEST OF APPELLANTS FOR JUDICIAL NOTICE

The Santa Rosa defendants join in the request of Appellant that the Court judicially notice the opinion of the United States Supreme Court in *City of Lafayette, Louisiana* v. *Louisiana Power and Light Co.* (1978) ___ U.S. ___, 55 L.Ed.2d 364, which was decided after the briefs in this case were filed. The Santa Rosa defendants have been required by the Community Redevelopment Law (Health and Safety Code §33000 *et seq.*), as a prerequisite to initiating the Santa Rosa Center Urban Renewal Project, to demonstrate that the project area is blighted. Moreover, the land disposition agreement between the Santa Rosa defendants and Ernest W. Hahn, Inc., is redevelopment action of the type contemplated by the mandate of the state legislature contained in this law that local government take all actions necessary to carry out lawfully adopted redevelopment plans. Given these circumstances, the plurality opinion of the Supreme Court in *City of Lafayette*, *supra*, supports the argument of appellees that the actions of the Santa Rosa defendants in entering into and carrying out the land disposition agreement are exempt from application of federal antitrust laws because they are governmental actions pursuant to a state policy, articulated in the Community Redevelopment Law, to displace the unregulated competition of the real estate market within the boundaries of the project and, by government intervention, to provide the means of alleviating and removing the social, economic and physical liabilities of urban blight. The general principles which require

this conclusion have been discussd at pp. 54-62 of the Opening Brief of the Santa Rosa defendants.

By Health and Safety Code §33036, the California legislature has determined that individual landowners lack incentive to improve, modernize and rehabilitate property in blighted areas so long as the condition of neighboring property remains unchanged and, as a result, the deterioration of blight cannot be halted or corrected except by redeveloping entire areas or substantial portions of areas. In the same statute, the state legislature has found that private assembly of land in blighted areas, without governmental intervention, is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of a lack of legal power and excessive costs, and that the remedying of blight may require public acquisition and the clearance of such areas and their redevelopment under proper governmental supervision, with appropriate planning, and continuing land use and construction controls.

Based on the foregoing findings, the California state legislature has declared in Health and Safety Code §33037:

> "For these reasons, it is declared to be the policy of this State:
>
> * * *
>
> "(b) That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, and the work of clearance, and in the making of improvements necessary therefore, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas can be redeveloped or rehabilitated.
>
> "(c) That the redevelopment of blighted areas and the provision of appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are public functions of state concern in the interest of health, safety, and welfare of the people of the state and of the communities in which the areas exist."

California cities and counties do not have untrammeled discretion to determine when and how they will exercise the powers delegated by the Community Redevelopment Law. As a prerequisite to redevelopment, the city council or board of supervisors must find, on the basis of evidence contained in a detailed record which is the product of an elaborate planning process, that the area designated for redevelopment is an area suffering from the social, economic and physical liabilities of blight. Health and Safety Code §33033. Health and Safety Code §33367 lists the detailed subfindings required to support such a conclusion that must be part of the ordinance adopting the redevelopment plan.

The justification required by the state law for displacement of unregulated development, use, and purchase and sale of property is the determination that the area suffers from blight, a condition that cannot be eliminated without government intervention into the competitive processes. Appellant, the City of Rohnert

Park, is bound by a final state court *in rem* judgment, which the Santa Rosa defendants hereafter request the Court judicially notice, that has conclusively determined that the Santa Rosa Center Urban Renewal Project is a blighted area qualified for redevelopment and, therefore, appropriate for government intervention in the form of public expenditures and stringent land use and planning controls.

When a project area has been selected and found by the procedures of state law to be a blighted area qualifying for redevelopment, local government is mandated by the state law to carry the plan into effect. Health and Safety Code §3370 provides that the city council, "at the time of, or in connection with, the adoption of the plan, shall declare its intention to undertake and complete any proceedings necessary to be carried out by the community under the provisions of the plan." By Health and Safety Code §33372, upon the filing of the ordinance adopting the plan, "the agency is vested with the responsibility for carrying out the plan."

Redevelopment pursuant to the Law, by definition, contemplates that in carrying out the plan the agency will dispose of land for private development and participate in the construction of public improvement. Section 33020 states, "Redevelopment" means "planning, development, replanning, redesign, clearance, reconstruction, rehabilitation, or any combination of these and the provision of such residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare, including recreational and other

facilities incidental or pertinent to them." The Agency is required to sell all property it acquires in a redevelopment project except property conveyed to a public body. Health and Safety Code §33432.

APPELLEE'S REQUEST FOR JUDICIAL NOTICE

Appellees City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa request that the Court take judicial notice of the following documents pursuant to Section 201(d), Federal Rules of Evidence:

1. The Findings of Fact and Conclusions of Law and Judgment in the consolidated state court cases designated Sonoma County Superior Court Actions No. 79465, 79762, 84237 and 81799, certified copies of which are attached hereto.

2. The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, in the appeal from the foregoing trial court judgment, designated 1 Civil No. 41,188, a certified copy of which is attached hereto.

3. The notification of denial of hearing by the Supreme Court of the State of California, a copy of which is attached hereto.

In their motion for summary judgment and at pp. 27-36 of their Opening Brief, the Santa Rosa defendants have argued that Rohnert Park is barred by a state court validating proceeding from suing in the federal courts for an alleged violation of state law and federal laws and regulations requiring that redevelopment project property be sold for not less than fair value or for alleged violations of antitrust laws in connection with the sale of the shopping center site to

Ernest W. Hahn, Inc. The Santa Rosa defendants presented documents which established that both of these issues had been raised and determined in a state court *in rem* proceeding brought pursuant a California statute that requires all interested parties to litigate all complaints against a redevelopment project in a single lawsuit and further provides that all parties are barred from raising in any other lawsuit claims that could have been adjudicated in such an *in rem* validating proceeding.

At the time of the motion for summary judgment and the filing of briefs in this case, the state court judgment adjudicating both the fair value claim and the antitrust claim in favor of the Santa Rosa defendants was on appeal in the state courts, and by state law the trial court judgment did not constitute a final judgment. The argument of the Santa Rosa defendants in their Opening Brief explained why the federal court should refuse to entertain these claims because of the *in rem* nature of the state court proceeding.

The documents which the Santa Rosa defendants request that the Court judicially notice establish that the judgment in the state court proceeding is now final and binding upon the City of Rohnert Park. The state court proceeding has determined that the Hahn Contract does not constitute a sale for less than fair value for re-use and does not violate 42 U.S.C. §1460(c)(4), the Urban Renewal Handbook's §7214.1, or Health and Safety Code §33433 and does not constitute a contract, combination or conspiracy in restraint of trade or an action in furtherance of a contract, combination or conspiracy in restraint of trade, or a monopoly, unlawful discrimination, an unfair practice, or unfair competition. By operation of the doctrine of *res judicata*, the judgment of the state court now bars Rohnert Park's attempt to relitigate these issues in the federal courts. See *Starr* v. *City and County of San Francisco* (1977) 72 Cal.App.3d 164.

The Santa Rosa defendants further request that this Court take judicial notice pursuant to Section 201(d), Federal Rules of Evidence, of:

1. The Notice of Action Pending recorded by the Appellants with the County Recorder for the County of Sonoma, State of California, based on this action. A certified copy of this Notice of Action Pending is attached hereto.

2. The Declaration of Richard E. Brandt filed in the Sonoma County Superior Court on August 29, 1978, a certified copy of which is attached hereto.

The *lis pendens* based on this lawsuit has been filed pursuant to California Code of Civil Procedure §409, which provides that such a notice may be filed in an action concerning real property or affecting the title or right of possession of real property. As the Declaration of Richard E. Brandt indicates, the general effect of the recording of such a *lis pendens* is to interfere with the financing of the project, which must be secured by the property. Thus, the *lis pendens* has the potential of preventing the project from proceeding without regard to the merits of the claims of Appellant and without the protection from abuse that would be provided by a bond or by review of the merits if Appellant had sought to achieve this directly by a preliminary injunction or a stay order pending appeal.

At the hearing on the appeal in this action, the Santa Rosa defendants will request that the Court determine, in connection with its review of the merits of this case, that this action does not concern real property or affect the title or right of possession of real property within the meaning of the California statute as it has been construed by the California courts. This lawsuit relates to the real property described in the Notice, the shopping center site to be conveyed to Hahn, only insofar as it includes a prayer requesting that a conveyance be barred as part of the relief. The Santa Rosa defendants submit that *Brownlee* v. *Vang* (1962) 206 Cal.App.2d 814, *Allied Eastern Financial* v. *Goheen Enterprises* (1968) 265 Cal.App.2d 131, and *Kendall-Brief Company* v. *Superior Court* (1976) 60 Cal. App.3d 462, indicate that the California statute authorizes the recording of a *lis pendens* only when the lawsuit involves the adjudication of property rights. This action does not involve an adjudication of the property interest of the parties in the property described in the Notice. Rather, it involves questions as to whether the property can be used for a shopping center and as to the adequacy of consideration paid for the land. The Santa Rosa defendants will request that the Court determine that this action is not one for which the California statute permits the recording of a Notice of Action Pending and specify by its decision that the *lis pendens* filed by the Appellant City of Rohnert Park be expunged.

DATED: November 16, 1978.

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants-Appellees
City of Santa Rosa and Urban Renewal
Agency of the City of Santa Rosa

In the
Court of Appeal of the State of California
For the First Appellate District
Division One
Civil Action No. 41188
Sonoma Nos. 79465, 79762, 81799, 84237

CODING ETC., et al.,

v.

URBAN RENEWAL AGENCY ETC. et al.

REMITTITUR

I, Clifford C. Porter, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on April 26, 1978 and that this opinion or decision has now become final. Each party shall bear its own costs on appeal.

Witness my hand and the seal of the Court affixed at my office this 29th day of June, 1978.

Clifford C. Porter, Clerk
(s) By Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: Nov. 14, 1978 County Clerk

In the Court of Appeal
of the State of California
First Appellate District

Division One
Civil Action No. 41188
(Superior Court Nos. 79465, 79762, 81799, 84237)

Codding Enterprises, a California corporation; Richard B. Codding, individually and on behalf of his minor children John and Bruce Codding; and George David Codding,

Plaintiffs and Appellants,

v.

Urban Renewal Agency of the City of Santa Rosa, a public entity; City of Santa Rosa, a municipal corporation; and City Council of the City of Santa Rosa,

Defendants and Respondents.

Four separate actions challenging an urban renewal plan for Santa Rosa were consolidated for trial. After extended trial, and upon a voluminous record, the trial court upheld the validity of the redevelopment plan. Plaintiffs appeal.

In 1961, an urban renewal project (hereinafter "Phase 1") was adopted by the Santa Rosa City Council for the downtown area of that city. In 1970, following considerable damage to the general area by an earthquake, amendments were adopted adding some 30 acres (Phase 2) to the original project. In 1974, some 12 acres were added (Phase 3). Phases 1 and 2 of the project were sustained against attacks by plaintiff (*Codding Enterprises* v. *Urban Renewal Agency of the City of Santa Rosa,* 1 Civil 36299 filed Oct. 23, 1975) and the present attacks are directed principally to Phase 3.

Despite appellants' contrary contention, we conclude that there is substantial evidence in the

administrative-legislative record to support the findings of the city council and the urban renewal agency that Phase 3 is a blighted area. There also is evidence of substance that the Phase 3 area has become an economic or social liability (as required by *Sweetwater Valley Civic Assn.* v. *City of National City,* 18 Cal.3d 270). The evidence shows that some two-thirds to nine-tenths of the buildings in the area meet the two requirements. Appellants attack the ratio on the ground that it is based on number of buildings, rather than on assessed values thereof. But that attack is insufficiently documented to persuade us that the supporting evidence is insubstantial. We recognize an appellate court's duty to review the evidence before the administrative or legislative body anew, and have made such a review, but we cannot find the supporting evidence inadequate to sustain the findings of the council.

We note, also, that a project area need not be restricted to lands and improvements which are individually detrimental or inimical to public health, safety or welfare (Health & Saf. Code, §33321, as it stood before amendment of 1976), whether the area is contiguous or not (§33320.2 before 1976 amendment). The area of Phase 1 is contiguous to that of Phase 2. Phase 3 is similarly contiguous to Phase 2, although separated from Phase 1 by the area of Phase 2. As the trial court found, Phases 1 and 2 were approved without specific reservation of the right to addition of territory thereto. But a fair reading of the ordinances adopting Phases 2 and 3 discloses findings that each added phase was found to be a reasonable element in the

effective development of the whole area. (Health & Saf. Code, §33321.) A redevelopment project, after adoption, may be amended at any time "it becomes necessary or desirable" (Health & Saf. Code, §33450). Such amendment becomes effective after proceedings comparable to those for original adoption of the project (Health & Saf. Code, §33451 et seq.), and amendments adding project areas are not in excess of the council's powers, even though they afford an advantage to the redevelopment project's private developer. (*Card* v. *Community Redevelopment Agency,* 61 Cal.App.3d 570, 573, fn. 1.)

Appellants, however, asert that Phase 1 had been completed at the time Phase 3 was added by amendment. Thus, they claim, the increased tax revenues yielded by assessment increases resulting from the redevelopment project had in fact become payable to the several taxing agencies within whose boundaries the project lies (Health & Saf. Code, §33670, subd. (b)). But that section provides for such return to the taxing agencies only after "loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by such redevelopment agency" to finance the redevelopment project, with interest thereon, have been paid (*id.*). The finding upon which appellants rely is only that Phase 1 had been "substantially completed," and this obviously refers to physical construction. There is, and could be, no finding that Phase 2, which had been added as a necessary part of Phase 1, had been completed. Moreover, there is no suggestion that all indebtedness of Phase 1, much less Phase 2, had been paid. Thus the necessary prerequi-

site to return of the entire tax proceeds to the several taxing agencies had not occurred. We recognize that to make amendments merely to broaden the tax base for redevelopment may well be improper (see *Regus* v. *City of Baldwin Park,* 70 Cal.App.3d 968, 975-976). Here, however, substantial evidence shows that Phase 2 and Phase 3 were each deemed to be an area "necessary for effective redevelopment of the area of which it is a part." On the whole record, we cannot conclude that the findings linking the three phases as a single redevelopment area were but subterfuge. Nor can we, as do appellants, regard Phase 3 as but a subterfuge to avoid return of the full value of Phase 1 to the general taxing agencies.

Appellants next assert that the price to be paid by the developer to the agency is less than its fair market value. It is undisputed that the appraisal accepted and approved by the urban renewal agency, the city council, and the Department of Housing and Urban Development does show the purchase price to be the fair market value. Appellants, however, assert that this appraisal is deficient as a matter of law. They argue that the appraisal wholly fails to give consideration to the costs to be paid by the agency in the redevelopment project. But the Lane appraisal reviews the project in detail, and states all such items. That it does so in a statistical form not chosen by appellants, or that its end result differs from theirs, does not invalidate the figure which Lane deems fair market value of the land to be sold.

Appellants particularly object to the appraiser's crediting the developer with a portion of the cost of

extensive parking structures which, under the redevelopment plan, are to be built by him at his own expense, and turned over to the city for free public use. Under one option afforded to it the agency is to pay far less than the total cost of such parking structures, and the developer is to make payments to the city, in annual and increasing amounts, in lieu of taxes thereon. Thus the city will acquire a needed parking facility for general public use, and will be paid by the developer an amount adequate to cover all expense of operating and maintenance plus a substantial amount in lieu of taxes which the several taxing agencies could not recover if the city were the original and continuing owner. Under the other option of the agency, the developer pays all cost of the public structures, and is to maintain them for free use by the public unrestricted to users of the shopping center.

We find no error in the planned credit to the development for what, in effect, amounts to a trade of the completed structure for credit upon the purchase price of the total property. The right to make a trade of property of at least equal value is recognized by one of the authorities upon which appellants rely (*Harman* v. *City & County of San Francisco,* 7 Cal.3d 150, 165, fn. 6).

Appellants also seek to view all expenditures of the agency, for traffic lights, streets, street lights and all other facilities, as benefitting solely the redevelopment area. It is apparent that many of these items are of benefit to the public of the city generally. But even if this deficiency in appellants' argument be ignored, the price to be paid by the developer substantially exceeds

the agency contribution, particularly when the benefit of the developer's contribution of parking structures is recognized.

A redevelopment plan is required to conform to the community's general plan (Health & Saf. Code, §33331) and the city council is required to so certify (*id.*, §33367). The city council, on recommendation of the city planning commission, has so certified. There is no question that the redevelopment is consistent, in all major respects, with the general plan adopted in 1967 and amended by the addition in 1969 of a plan for the central business district. Appellants, however, point to two streets proposed by the redevelopment plan to be closed. Continued existence of these streets is contemplated by the general plan as it relates to the central business district. But, by joint resolution of the planning commissions of Santa Rosa and Sonoma County, adopted late in 1967, it is stated that the "General Plan is not a precise plan nor a zoning ordinance and does not show or pretend to show the exact location of streets . . ., but shows their general location, character and extent." The redevelopment plan proposes a substitute grid of streets and a traffic loop for this portion of the business district. The question of conformity to the general plan was submitted to the planning commission, which found it generally consistent. The city council made a like finding. We find no reason to interfere. We note that no ordinance closing either street has been adopted, or even introduced, by the city council. Thus we do not have the issues of evidence and findings which may arise (see *City of Rancho Palos Verdes* v. *City Council,* 59 Cal.App.3d

869).

An environmental impact report was prepared and advertised. Comments thereon were made, and those adverse were met by reasonable data, discussion, and amendment. The agency and the city then approved the E.I.R., finding only that the project "will not have an adverse effect upon the environment." This finding is merely in the language of the statute and appellants assert it to be therefore conclusory and, without subfindings, insufficient. We are compelled to agree. "The challenged decision must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision . . . ." (*Topanga Assn. for a Scenic Community* v. *County of Los Angeles,* 11 Cal.3d 506, 515.) A resolution approving an E.I.R. should at least identify some of the adverse effects inherent in almost any development, and determine that they are outweighed by the project's advantages (*San Francisco Ecology Center* v. *City and County of San Francisco,* 48 Cal.App.3d 584, 596 [hg. den.]; see also *City of Rancho Palos Verdes* v. *City Council, supra,* 59 Cal.App.3d 869, 890). Reading of the draft E.I.R., the comments thereon, the answers thereto and the amendments evoked thereby in the final E.I.R. would seem to reveal the reasoning processes of the appraising agencies, but somewhat more detailed findings than were here made are required. The record discloses ample evidence to support adequate findings approving the E.I.R., and we find no merit in appellants' claims that alternatives are not adequately considered, or that the responses to comments on the draft E.I.R. are inadequate. Nonetheless, the authorities require us to

remand the matter for more detailed findings by agency and council.

We find no merit in the contention that the actions of the agency and the council are void because of claimed conflicts of interest of members thereof.

The judgment is reversed only insofar as it sustains the findings of the agency and the council approving the E.I.R. That issue is to be remanded by the trial court to those two bodies for reconsideration of their findings approving the E.I.R. Each party shall bear its own costs on appeal.

By: J. Draper*

We concur:
P.J. Racanelli
J. Elkington

*Retired Presiding Justice of the Court of Appeal assigned by the Chairperson of the Judicial Council.

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United States District Court
Northern District of California
Civil Action No. 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants-Appellees.

NOTICE OF MOTION TO EXPUNGE *LIS PENDENS*
[28 U.S.C. §1964, California Code of Civil Procedure §409.1]

TO PLAINTIFF CITY OF ROHNERT PARK AND WILLIAM N. WILLENS, ITS ATTORNEY:

PLEASE TAKE NOTICE that on December 14, 1979, at 11:00 a.m. in the Courtroom of the Honorable William W. Schwarzer, located in the Federal Building at 450 Golden Gate Avenue, San Francisco, California, defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (now known as the Redevelopment Agency of the City of Santa Rosa) will

move the Court for an order expunging the Notice of Action Pending (*lis pendens*) recorded by plaintiff City of Rohnert Park in the Official Records of the County of Sonoma, California.

The motion will be made on the ground that this action does not affect the title to or right of possession of the real property described in the notice and on the ground that this action has not been commenced or prosecuted in good faith and for a proper purpose.

This motion will be based on the brief of defendants City of Santa Rosa and Redevelopment Agency of the City of Santa Rosa, this notice of motion, the Affidavit of Richard E. Brandt and exhibits filed in support of the motion, the Proposed Order submitted with the motion and on such matters as may be presented at the time of the hearing on the motion.

Dated: November 21, 1979.

McDONOUGH, HOLLAND,
SCHWARTZ & ALLEN
A Professional Corporation

By Richard E. Brandt

Attorneys for Defendants-Appellees
City of Santa Rosa and Urban Renewal
Agency of the City of Santa Rosa

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eight-

een years and not a party to the within above entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814. On November 21, 1979, I served the within NOTICE OF MOTION TO EXPUNGE LIS PENDENS on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento addressed as follows:

John J. Powers III, Esq.
Appellate Section
Antitrust Division
Department of Justice
Washington, D.C. 20530

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Del Amo Financial Center
Torrance, CA 90503

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 21, 1979, at Sacramento, California.

Mary M. Miller

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Attorneys for Defendants

In the Superior Court of the State of California
In and For the County of Sonoma
Civil Action Nos. 79465, 79762, 84237, 81799

Codding Enterprises, et al.,
Plaintiffs,
v.
Urban Renewal Agency of the City of Santa Rosa, et al.,
Defendants.

NOTICE OF ORDER *EXPUNGING LIS PENDENS* TO PLAINTIFFS AND TO THEIR ATTORNEY OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN that on October 25, 1978, the Court, having granted defendants' Motion to Expunge Lis Pendens Notice from Record, filed its Order Expunging Lis Pendens. A copy of the Order Expunging Lis Pendens is attached to this notice.

Dated: August 22, 1979.

BRUCE LEAVITT, City Attorney
City of Santa Rosa

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In the Superior Court of the State of California
In and For the County of Sonoma
Civil Action Nos. 79465, 79762, 84237, 81799

Codding Enterprises, a California corporation, in its own behalf and on behalf of all other persons similarly situated,
Plaintiffs,
v.
Urban Renewal Agency of the City of Santa Rosa, a public entity, and does one through twenty,
Defendants.

ORDER EXPUNGING LIS PENDENS
[CCP §§ 409.1, 1003]

The motion of defendants Redevelopment Agency of

the City of Santa Rosa and City of Santa Rosa for an order expunging a notice of lis pendens came on regularly for hearing on August 14, 1978. Plaintiffs appeared by William J. Smith, Esq., their attorney; and defendants appeared by Richard E. Brandt, Esq., of McDonough, Holland, Schwartz & Allen, A Professional Corporation, their attorneys.

The court, having considered the declarations, memoranda of points and authorities, supplemental memoranda of points and authorities, and other documents and evidence in support of and in opposition to the motion, having considered the opinion of the Court of Appeal for the First Appellate District in this case and the Findings of Fact, Conclusions of Law and Judgment previously entered in this action by the Honorable J. Hilary Cook, having heard the arguments of counsel, and being fully advised in the premises, finds that the Notice of Lis Pendens should be expunged on the ground that the action before this Court on remand does not affect title to or right of possession of the real property described in the Notice.

IT IS ORDERED that the motion of defendants be, and the same is hereby, granted, and that the Notice of Lis Pendens recorded in the Office of the County Recorder of Sonoma County, City of Santa Rosa, California, by plaintiffs on February 27, 1978, at Book 3359, Page 325, of the Official Records of the County of Sonoma, referring to the property located in the City of Santa Rosa, County of Sonoma, State of California, described as follows:

> Commencing at the southwest corner of the intersection of Third and "B" Streets, then southeasterly along the West line of "B" Street to the north line of First Street; thence southwesterly along the North line of First Street to a point approximately 90 feet west of the west line of "A" Street; thence southeasterly to the northern line of the land owned by the Sonoma County Water Agency; thence southwesterly along this line to the west boundary of the Santa Rosa Center Project, Calif. R-45, thence northeasterly along this boundary to Third Street; thence easterly along the south line of Third Street to the point of beginning.

be hereby expunged so as not to constitute constructive or actual notice of any of the matters contained therein, or any of the matters relating to such action, nor create any duty of inquiry in any person hereafter dealing with the property described therein.

DATED: October 23, 1978.

Judge of the Superior Court

PROOF OF SERVICE BY PERSONAL DELIVERY

I am a citizen of the United States and a resident of the County of Sacramento; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814. On August 23, 1979, I served the within NOTICE OF ORDER EXPUNGING LIS PENDENS on the plaintiffs' counsel in said action by personally delivering a true copy thereof to William J. Smith, Esq. at the Sonoma County Courthouse, 2555 Mendocino Avenue, Santa Rosa, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 23, 1979, at Santa Rosa, California.

Richard E. Brandt

The California Health and Safety Code, Section 33500:

> § 33500. No action attacking or otherwise questioning the validity of any redevelopment plan, or amendment to a redevelopment plan, or the adoption or approval of such plan, or amendment, or any of the findings or determinations of the agency or the legislative body in connection with such plan shall be brought prior to the adoption of the redevelopment plan nor at any time after the elapse of 60 days from and after the date of adoption of the ordinance adopting or amending the plan.
>
> The amendments made to this section at the 1977-78 Regular Session of the Legislature do not represent a change in, but are declaratory of, existing law.

The California Health and Safety Code, Section 33501:

§ 33501. An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceedings theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, and the adoption of the redevelopment or renewal plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale and delivery of the bonds and for the payment of the principal thereof and interest thereon.

The California Health and Safety Code, Section 33503:

§ 33503. The judgment, if no appeal is taken, or if taken and the judgment is affirmed shall be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other parties and if the judgment determines that the agency is lawfully established, that the redevelopment plan is valid and effective, that the agency is authorized to issue such bonds and that such bonds when issued will be valid, the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.

The California Code of Civil Procedure, Section 860:

§ 860. A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem.

The California Code of Civil Procedure, Section 869:

§ 869. No contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified. The availability to any public agency, including any local agency, or to its officers of agents, of the remedy provided by this chapter, shall not be construed to preclude the use by such public agency or its officers or agents, of mandamus or any other remedy to determine the validity of any thing or matter.

The California Code of Civil Procedure, Section 870:

§ 870. The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 and 473.5, thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.

Supreme Court, U. S.
FILED
JAN 4 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Appendices A through Z to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendices

TABLE OF CONTENTS

Appendix		Page
A	Complaint for Declaratory and Injunctive Relief	1
B	Answer of James T. Lynn, as Secretary of the United States Department of Housing and Urban Development	42
C	Answer of Ernest W. Hahn, Inc.	48
D	Answer of City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa	60
E(1)	Motion and Notice of Motion for Summary Judgment of Ernest W. Hahn, Inc.	78
(2)	Affidavit of John M. Gilchrist, Jr. in Support of Motion for Summary Judgment	80
(3)	Memorandum of Points and Authorities in Support of Motion for Summary Judgment	84
F(1)	Notice of Motion for Summary Judgment and Motion to Dismiss of Secretary of the Department of Housing and Urban Development	97
(2)	Memorandum of Points and Authorities in Support of Secretary's Motion for Summary Judgment	99
G(1)	Notice of Motion for Summary Judgment and Motion to Dismiss of City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa	122

Appendix		Page
(2)	Brief of City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa in Support of Motion for Summary Judgment	124
H(1)	Affidavit of R. Dean Stahr	169
(2)	Affidavit of Roland L. Brust	173
(3)	Affidavit of Claude Gruen	179
I	Order Granting Summary Judgment Filed November 24, 1976	183
J	Judgment filed December 6, 1976	189
K	Notice of Appeal Filed December 16, 1976	190
L	Opinion of Court of Appeals Filed May 9, 1979	192
M(1)	Petition for Rehearing Under Rule 40, and Suggestion of a Hearing In Banc Under Rule 35, Federal Rules of Appellate Procedure, filed May 22, 1979	202
(2)	Order Denying Petition Filed July 24, 1979	219
N	Opinion of Court of Appeals filed July 24, 1979, as corrected by Order of Court dated October 26, 1979 (Appendix R)	220
O(1)	Petition for Rehearing Under Rule 40, and Suggestion of a Hearing In Banc Under Rule 35, Federal Rules of Appellate Procedure, filed August 6, 1979	241
(2)	Order Denying Petition, Filed October 26, 1979	254

Appendix		Page
P(1)	Plaintiff-Appellant's Motion for Judgment of Civil Contempt Upon Defendants-Appellees Pursuant to Rule 27, Federal Rules of Appellate Procedure	255
(2)	Points and Authorities in Support of Motion	296
Q	Order Denying Contempt Judgment	306
R	Order Correcting Opinion filed by Court of Appeals October 26, 1979	307
S	Plaintiff-Appellant's Motion for Stay of Mandate	309
T	Order Staying Issuance of Mandate filed November 7, 1979	312
U	Order Recalling Stay of Mandate filed November 9, 1979	314
V	Appellant's Reply to Objections of Appellees Ernest W. Hahn, Inc. City of Santa Rosa and Its Urban Renewal Agency to Appellant's Motion for a Stay of Mandate	315
	Pertinent Statutes:	
W(1)	Sherman Act, 15 U.S.C. 1 et seq., and more particularly §§ 1 and 2	341
(2)	Clayton Act, 15 U.S.C. 12 et seq., and more particularly § 26	343
(3)	Administrative Procedure Act, 5 U.S.C. 551 et seq., 5 U.S.C. 701 et seq. and more particularly §§ 702 and 706(2)(A), (C) and (D)	344

Appendix Page

(4) National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq., and more particularly 5 U.S.C. 1460(c)(4) 346

Regulations:

X Urban Renewal Handbook, Department of Housing and Urban Development, 7214.1 Rev. 8/74, Chapters 1-3 347

Depositions and Exhibits:

Y(1) Pages 7, 9 and 24 of Exhibit 30 to Deposition of James K. Burns (Ratcliffe Re-Use Appraisal of November 15, 1972) 368

(2) Pages 114-115 of Exhibit 1 to Deposition of Michael J. Daugherty (HUD Environmental Impact Statement of July, 1975) 371

(3) Pages 1 and 6 of Exhibit 6 to Deposition of Ernest W. Hahn (Agreement between Teachers Insurance and Annuity Association of America of March 18, 1976, and Ernest W. Hahn, Inc.) 374

Note:

Exhibit attached to Affidavit of R. Dean Stahr has been omitted.

Page numbers on all original pleadings appear in brackets [] at end of the last word or sentence of said pleading.

Page numbers for the appendix appear at the top of each page thereof.

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Appendices A through Z to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Appendix A

Original Filed
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United States District Court
Northern District of California

Civil Action No. 74 2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, by its attorneys, alleges:

I

(a) This action arises under various laws of the United States, more particularly The Housing Act of 1949 as amended (42 U.S.C. 1441, et seq.), the Sherman Act (15 U.S.C. 1 and 2), the Clayton Act (15 U.S.C. 26), the

National Environmental Policy Act (42 U.S.C. 4321, et seq.) and the Administrative Procedure Act (5 U.S.C. 701, et seq.).

(b) The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand ($10,000) dollars. (28 U.S.C. 1331.) [1]

(c) This is an action for a declaratory judgment pursuant to the provisions of 28 U.S.C. 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and for injunctive relief.

II

Plaintiff, CITY OF ROHNERT PARK, is and was at all times herein material a municipal corporation, organized pursuant to Part 1 of Division 2 of the Government Code, and is situated in the County of Sonoma, State of California. Said plaintiff is hereinafter referred to as "Plaintiff City." Plaintiff City, its inhabitants, taxpayers and property owners have been injured in their business and property, and are threatened with further injury to their said business and property as the result of the acts and conduct of the defendants hereinafter named as more particularly appears hereinafter.

(a) Defendant JAMES T. LYNN is the Secretary of the United States Department of Housing and Urban Development, and is sued herein solely in his official capacity. Under the provisions of the Housing Act of 1949, said defendant may sue and be sued. The duties of this defendant, as said Secretary, are performed in the County of Sonoma by surbodinates based in the San Francisco Area office of the Department which is located in the Northern District of California. Said subordinates are and were at all times herein material acting in accordance with the

policies of said Department, not contrary thereto. They include without limitation, James H. Price, Area Director; Julian A. Fitzhugh, Program Manager, Area B, and Stephen B. Sachs, Assistant Program Manager, Area B. Said defendant is hereinafter referred to as "Defendant Secretary."

(b) Defendant CITY OF SANTA ROSA is and was at all times herein material a municipal corporation organized under a freeholders charter adopted and amended pursuant to the provisions [2] of the Constitution and laws of the State of California, and is also situated in said County of Sonoma in said State. Said defendant is hereinafter referred to as "Defendant City."

(c) Defendant URBAN RENEWAL AGENCY of the City of Santa Rosa, is and was at all times herein material, a public body, corporate and politic, organized by Defendant City on or about March 28, 1958, pursuant to Part 1 of Division 24 of the Health and Safety Code of the State of California, and has its office in Defendant City. Said defendant is hereinafter referred to as "Defendant Agency."

(d) Defendant ERNEST W. HAHN, INC., is and was at all times herein material a California corporation, having an office for the transaction of business in the City of Hawthorne, County of Los Angeles, State of California. Said defendant is and was at all of said times engaged in the business of "shopping center developer" in said County of Sonoma as hereinafter more fully appears. Said defendant is hereinafter referred to as "Defendant Developer."

IV

(a) Defendant City is located some seven (7) miles north of Plaintiff City. The principal and most convenient means

of vehicular ingress and egress for both of said cities is United States Highway 101.

(b) On or about October 10, 1966, Plaintiff City adopted a general or master plan for the City of Rohnert Park pursuant to the requirements of Chapter 3, Title 7 of the Government Code. Said master plan, inter alia, designated certain real property within its boundaries as a site for the development of commercial facilities including a regional shopping center. Some of the real property so designated is and was at all times herein material owned by Plaintiff City. The development of this site for commercial purposes has been and will be financed entirely [3] with private capital. The site is located on both sides of U.S. Highway 101 at the Rohnert Park Expressway.

(c) On or about September 3, 1974, Plaintiff City rezoned portions of the property designated as aforesaid consistent with the requirement of Section 65860, Government Code, which requires generally that city zoning ordinances shall be consistent with the general or master plan of a city, including Plaintiff City.

(d) The purpose of Plaintiff City in designating, zoning and developing said site has been to further its proprietary interests; to increase its retail sales tax revenue, and to further the interests of its inhabitants, property owners and taxpayers.

V

(a) During the period 1966-1972, Plaintiff City spent the aggregate sum of $1,207,000 for street construction, sewer and water mains and other improvements to prepare said site for the purpose for which it was designated in its said general plan. The money required to finance this work was raised by special assessments levied on the various owners of the site.

(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged.

VI

(a) On December 5, 1961, Defendant City adopted a redevelopment plan for a redevelopment project area within its boundaries known as the Santa Rosa Center Project (California R-45). This area is immediately adjacent to U.S. Highway 101. [4] This redevelopment plan has been amended from time to time, and the last of these amendments was adopted on March 10, 1970. Defendant Agency is and has been at all times herein material vested with the responsibility for carrying out the redevelopment plan with the approval of Defendant Secretary and his subordinates. Defendant Agency, pursuant to an agreement with Defendant Developer, has been engaged since March, 1972, in a scheme to develop a regional shopping center, which is to be subsidized with federal funds. This shopping center is to occupy some thirty-two (32) acres in the downtown area of Defendant City, theretofore acquired by Defendant Agency with funds furnished by Defendant Secretary. This site had been originally destined under the redevelopment plan as last amended for land uses not compatible with such a center. Accordingly, on October 29, 1974, Defendant City purported to again amend said plan to provide for said center and at the same time approved a land disposition agreement designed to subsidize Defendant Developer, as alleged in paragraph VII, infra. No provision whatsoever

has ever been made in this redevelopment plan for permanent family housing (Housing Act of 1949, U.S.C. Title 42, Sections 1441-1441a).

(b) The said redevelopment plan initially adopted by Defendant City on or about December 5, 1961, was approved by the United States Housing and Home Finance Agency (predecessor of United States Department of Housing and Urban Development) on January 15, 1962. Thereafter and on March 9, 1962, said Housing and Home Finance Agency received an application for a Loan and Grant from Defendant Agency. Pursuant to said application, and on June 2, 1962, a loan and grant contract was entered into between Defendant Agency and said Housing and Home Finance Agency whereunder the United States was to defray three-fourths (¾) of the net costs of the redevelopment project and Defendant City was to defray by means of grants-in-aid one-fourth (¼) of the [5] said net costs of the project. This contract authorized redevelopment activities in approximately forty (40) acres of the downtown section of Defendant City. This contract provided for a Federal Temporary Loan in the sum of $4,922,616, and a Federal Project Grant of $2,625,023.

(c) The said contract has been amended eight (8) times, and all of these amendments have been for the purpose of increasing said loans and grants, so that by the last or eighth amendment, executed on November 27, 1973, the temporary loan was increased to a total of $16,557,309, and the grant to a total of $12,236,717. The sixth amendment to the contract, executed on September 14, 1970, increased the total grant from $3,263,332 to $8,318,497 (an increase of $5,055,165), and increased the temporary loan from $5,908,-880 to $13,223,939 (an increase of $7,315,059. The purpose of this amendment to said loan and grant contract was to

provide Defendant Agency with funds to acquire, as aforesaid, said thirty-two (32) acres. This action was taken after the effective date of the National Environmental Policy Act, but Defendant Secretary did not at any time prepare an Environmental Impact Statement on said redevelopment project (California R-45).

VII

Said agreement between Defendant Agency and Defendant Developer is an "exclusive" agreement, and was entered into with the knowledge and consent of Defendant Secretary. This agreement provides, *inter alia,* that Defendant Agency will sell said thirty-two (32) acres only to Defendant Developer for the sum of $2,000,000, and that Defendant Developer will build thereon a massive shopping center containing approximately 760,000 square feet of retail sales space. This acreage was acquired and cleared [6] by Defendant Agency at a cost of some $7,000,000. The fair market value of the property for the highest and best uses permitted under the redevelopment plan is approximately $12,000,000. The effect of the agreement will be therefore to subsidize Defendant Developer by the use of public funds to the extent of about $10,000,000. This phase of the agreement, if carried out, will constitute a violation of the Housing Act of 1949 and the Community Redevelopment Law of the State of California, both of which require that property in the urban renewal area be sold for its fair market value for uses in accordance with the urban renewal plan, all as set forth in 42 U.S.C. 1460(c)(4); Urban Renewal Manual Handbook 7214.1 Rev., Chapter 1, p. 1, Chapter 3, p. 9; and Health and Safety Code, Section 33433.

VIII

The facts alleged in paragraph IX hereof, infra, establish that the natural and probable consequences of this agreement when implemented as alleged in paragraph VII hereof, supra, will be the following:

(a) To enhance and render impregnable the already dominant position which Defendant City and its merchants have in the retail merchandising industry in Somona County generally and more specifically in the Santa Rosa Trade Area;

(b) To eliminate actual and potential competition from merchants located in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners;

(c) To enhance Defendant City's already large share of retail sales tax dollars collected in Sonoma County and to increase the burden of property taxes in other communities, including Plaintiff City, all to the irreparable loss or damage of [7] Plaintiff City, its inhabitants, taxpayers and property owners;

(d) To unduly restrain the trade and commerce among the states and with foreign countries.

IX

(a) A substantial part of all merchandise sold in retail outlets in Sonoma County is imported into that County from states other than California and from foreign countries.

(b) Defendant City is the hub of the Santa Rosa Trade Area and attracts trade and custom in substantial numbers from the following neighboring cities: Plaintiff City, Cloverdale, Healdsburg, Sebastopol, Cotati, Petaluma and Sonoma, as well as the unincorporated territory adjacent to these cities.

(c) Defendant City's share of total Sonoma County retail sales was in excess of forty-four percent (44%) in 1973.

(d) General merchandise taxable retail store sales (including drug stores) amounted to $70,900,000 in 1973, for Defendant City, as compared to $94,000,000 for Sonoma County as a whole.

(e) Defendant City captured in excess of seventy-five percent (75.4%) of all taxable general merchandise sales made in Sonoma County in 1973.

(f) All taxable retail sales in Defendant City in 1972 totalled $179,381,000.

(g) Retail sales tax is applicable not only to residents, but to non-residents of the community where it is levied. Thus, this tax helps broaden the tax base and contributes to relieving the local property tax burden. The following table showing sales tax distribution in Sonoma County, 1973-1974, establishes the outstanding trade and fiscal advantages now enjoyed by Defendant City and its merchants, inhabitants and taxpayers: [8]

County of Sonoma
Sales Tax Distribution

Adjusted Net Sales Tax 1973-74

	Sales Tax Dollars	Percent of Total	Increase Over Prior Year	Population Total
Cloverdale	$ 88,373	1.30%	27.19%	3,440
Cotati	90,124	1.32	23.91	2,830
Healdsburg	455,109	6.67	96.40	5,900
Petaluma	795,855	11.67	17.09	31,150
Rohnert Park	138,774	2.03	38.07	11,500
Santa Rosa	2,616,780	38.37	15.10	60,800
Sebastopol	200,616	2.94	10.90	4,480
Sonoma	187,206	2.74	11.41	4,850
Sub-Total	$4,572,837	67.05%	20.82%	124,950
Unincorporated Area	$2,247,868	32.96%	6.89%	100,450
Entire County	$6,820,705	100.00%	15.84%	225,400

Sources: State Board of Equalization
State Department of Finance

(h) There are now approximately 748,000 square feet of general merchandise space available in Defendant City. Under the terms of said agreement Defendant Developer will construct an additional 438,000 square feet of general merchandise space in the proposed shopping center, thus increasing the total of such space in Defendant City to 1,186,000 square feet. Defendant Developer will also build pursuant to said contract 322,000 square feet of other retail space in the shopping center. The excess retail space capacity to be so created will not be absorbed by the demand therefor until some time after the year 1980. Hence, this publicly subsidized project will render noncompetitive and therefore impractical any project for a retail center not similarly subsidized in the proximity of Defendant City.

(i) The said contract also requires that this subsidized shopping center shall provide free offstreet parking in a [9] garage with approximately 1,250 stalls for patrons of the center. The natural and probable consequence of providing such free parking will be to induce customers to trade only at the regional shopping center of Defendant Developer and to reduce or eliminate actual or potential competition from retail merchants in surrounding communities including Plaintiff City. According to the contract the parking structure in which these stalls are to be located will be built by Defendant Developer for Defendant Agency at a cost not to exceed $2,000,000, and this cost is to be defrayed from the proceeds of the sale of not less than $4,200,000 in tax allocation bonds issued pursuant to the California Community Redevelopment Law (Health and Safety Code, Section 36670). The probable and natural consequence of this additional tax subsidy will be to divert for a period of approximately twenty (20) years the major portion of the property tax collected in the redevelopment area to pay the

principal and interest due on said bonds, and to require that the burden of the deficit thereby created be borne by other taxing authorities, including Plaintiff City. The additional tax subsidy to be so created will also serve to discourage and to make impractical any project for a retail center in the proximity of Defendant City which is not similarly subsidized.

(j) The contract also provides that Defendant Agency is to acquire and sell additional acreage in the redevelopment area to Defendant Developer. The cost of acquiring and clearing said property is $6,000,000. Under the terms of the agreement this property will be conveyed to Defendant Developer either without charge or for the sum of $1,000,000, all at the option of Defendant Agency. Plaintiff City, on information and belief, alleges that said property will be acquired with federal funds. This additional subsidy will also chill and smother any competitive project for a retail center in the proximity of Defendant City, which is not similarly subsidized. [10]

X

(a) In early September, 1973, Plaintiff City became aware of the salient features of the contract between Defendant Agency and Defendant Developer, and at about that time it also learned that Defendant Secretary had received an application from Defendant Agency requesting that its total grant be increased by an additional $1,800,000 and that its project temporary loan be also increased by an additional $1,800,000. Plaintiff City likewise learned that the purpose of this application was to procure funds to defray the costs to be incurred in implementing the contract between Defendant Agency and Defendant Developer. Realizing that this contract and its implementation would entirely frustrate its plan for a regional retail center to its injury and

that of its residents and taxpayers, Plaintiff City determined to request Defendant Secretary not to approve the land disposition provision of the contract and not to approve any further applications for federal funds. To this end, Plaintiff City on or about October 29, 1973, addressed a letter to Defendant Secretary outlining its objections to the contract and its further implementation with federal funds, and requesting an administrative hearing. A true copy of said letter is attached hereto marked Exhibit A and made a part hereof.

(b) On November 27, 1973, Defendant Secretary heedless of Plaintiff City's said letter, granted Defendant Agency's application for said additional funds.

(c) Defendant Secretary by letter dated December 27, 1973, granted Plaintiff City's request for a hearing and scheduled for this purpose an informal conference to be held on January 15, 1974. In this letter Defendant Secretary also requested that Plaintiff City's further comments be submitted in writing to one of his subordinates. A true copy of this letter is attached hereto, marked Exhibit B, and made a part hereof. On January 11, [11] 1974, and in compliance with the request of Defendant Secretary, Plaintiff City submitted a letter containing its further comments. A true copy of said letter is attached hereto, marked Exhibit C, and made a part hereof.

(d) Said informal conference was held as scheduled before said Mr. Julian A. Fitzhugh, a subordinate of Defendant Secretary. During the course of the conference the question, among others, was raised as to whether Defendant Secretary could legally continue to advance further funds to Defendant Agency without first preparing an Environmental Impact Statement, as required by The National Environmental Policy Act (42 U.S.C. Sections 3431, et

seq.). At the conclusion of the conference, the matter was submitted for decision to Defendant Secretary's said subordinate.

(e) By letter dated May 16, 1974, Defendant Secretary informed Plaintiff City, in substance, that it found its objections to the contract and its implementation entirely without merit. A true copy of this letter is attached hereto, marked Exhibit D, and made a part hereof. In said letter, Defendant Secretary, in effect, admitted that it was required to prepare an Environmental Impact Statement before making further funds available to Defendant Agency, but then went on to state ". . . the Department will still have substantial ability to eliminate or mitigate any adverse environmental effects determined during the environmental clearance process prior to approval of disposition and plan change activities, which are the activities that determine the actual reuse of project land" (Exhibit D, p. 6).

XI

(a) Defendant Secretary has not prepared said Environmental Impact Statement but has nevertheless since May, 1974, advanced additional funds to Defendant Agency in a sum in excess of $500,000. [12]

(b) Defendant Agency and Defendant City on September 24, 1974, filed an action in the Superior Court of the State of California in and for the County of Sonoma against Plaintiff City. The purpose of the action is permanently to enjoin any development of Plaintiff City's commercial site, and to this end it challenges the validity of procedures taken by the governing body of Plaintiff City to rezone portions of said site. The pleadings on file disclose that Defendant City and Defendant Agency claim, in effect, the sole and exclusive right to develop a regional

shopping center in said County, and that any erosion of this alleged right will result in "irreparable injury" to them. Said action is without merit and was brought to deter Plaintiff City from authorizing and implementing the development of its commercial site in accordance with its general plan adopted as aforesaid on October 10, 1966.

(c) Plaintiff City alleges on information and belief that the cost of said litigation is being defrayed with funds obtained by Defendant City from Defendant Secretary.

XII

All of the offenses and other conduct charged above against defendants herein, including said litigation, were in furtherance of said conspiracy in restraint of trade and of their attempt to monopolize said trade in Sonoma County, all in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2), and said offenses and other conduct threaten irreparable loss or damage to Plaintiff City, its inhabitants, merchants, property owners and taxpayers.

WHEREFORE, Plaintiff City prays for judgment as follows:

1. A declaration that the sale of land to Defendant Developer by Defendant Agency at less than the fair market value of the land for its highest and best uses permitted under the urban renewal plan of Defendant City is illegal and in violation [13] of 42 U.S.C 1460(c)(4) and Section 33433, Health and Safety Code;

2. A declaration that Defendant Secretary is acting illegally and in excess of his authority in approving the agreement between Defendant Agency and Defendant Developer for disposition of said land to the latter;

3. A declaration that the issuance by Defendant Agency of tax allocation bonds to finance construction of all or any

part of the urban renewal project in accordance with said agreement will cause irreparable damage to the various taxing agencies of Sonoma County, including Plaintiff City;

4. A declaration that Defendant Secretary has acted and continues to act illegally and in excess of his authority in approving payments of public funds to Defendant Agency without an Environmental Impact Statement pursuant to the provisions of The National Environmental Policy Act;

5. A declaration that Defendant Secretary has acted and continues to act illegally and in excess of his authority in approving payments of public funds to Defendant Agency without first ascertaining that action and conduct of Defendant Agency and Defendant City complies in all respects with the laws of the State of California;

6. A declaration that the agreement between Defendant Agency and Defendant Developer, if carried out, represents a combination and conspiracy in unreasonable restraint of interstate trade or commerce in Sonoma County;

7. A declaration that the agreement between Defendant Agency and Defendant Developer, if carried out, represent an attempt to monopolize, or a combination or conspiracy to monopolize interstate trade or commerce in Sonoma County or some part thereof;

8. A declaration that Plaintiff City, its inhabitants, merchants, property owners and taxpayers are threatened with loss or damage by violations of the antitrust laws, which loss or [14] damage greatly exceeds the sum of $1,207,000;

9. A declaration that Plaintiff City is entitled to sue for and have injunctive relief against said threatened loss

or damage by the violations of the antitrust laws and the Housing Act of 1949;

10. Plaintiff City further prays for an injunction permanently restraining:

(a) Defendant Secretary or any of his subordinates from approving the land disposition agreement between Defendant Agency and Defendant Developer;

(b) Defendant Agency from selling, transferring or otherwise disposing of all land covered by and described in the disposition agreement with Defendant Developer to said defendant, its successors, heirs and assigns;

(c) Defendant Agency from selling, transferring or otherwise disposing of all land acquired or to be acquired by it for sale, transfer or other disposition to Defendant Developer for use by it in connection with or as part of the regional shopping center contemplated by Defendant Developer;

(d) Defendant City from taking any action of any kind whatsoever, including without limitation, the exercise of its powers of eminent domain to condemn or otherwise acquire any real property with public funds for eventual resale to Defendant Developer;

(e) Defendant Secretary, Defendant City and Defendant Agency from taking any further action of any kind whatsoever, including without limitation, authorizing or issuing any obligations, securities or notes by Defendant Agency which are guaranteed by Defendant Secretary, until or unless said Defendant Secretary first complies with all requirements of The National Environmental Policy Act;

(f) Defendant Secretary from authorizing the [15] payment, either by loan, grant or guaranty of any further public funds to Defendant Agency until or unless said Defendant Secretary first complies with all requirements of The National Environmental Policy Act;

(g) Defendant Secretary from authorizing, approving or taking any action whatsoever without first complying with The National Housing Act—42 U.S.C. 1460(c)(4)—and the California Community Redevelopment Law; Section 33433, Health and Safety Code;

(h) Defendant Secretary, Defendant City and Defendant Agency from taking any action of any kind whatsoever the effect of which will cause or threaten irreparable loss or damage to Plaintiff City by reason of any violation of the antitrust laws of the United States—15 U.S.C. 1, 2 and the Housing Act of 1949.

11. Plaintiff City further prays for judgment awarding it all costs sustained by it in bringing this action, including without limitation, reasonable attorneys' fees.

12. Plaintiff further prays for such other relief as is proper in the premises.

Dated: November 19, 1974.

WILLIAM M. BRINTON
RICARDO J. HECHT

By WILLIAM M. BRINTON

Of Counsel
COTTON, SELIGMAN & RAY [16]

EXHIBIT A

October 29, 1973

Mr. James H. Price, Area Director
Department of Housing & Urban Development
One Embarcadero Center, Suit 1600
San Francisco, California 94111

RE: SANTA ROSA CENTER PROJECT
(CALIFORNIA R 45)

ADMINISTRATIVE COMPLAINT

Dear Mr. Price:

We represent the City of Rohnert Park, a city organized and existing under and by virtue of the laws of the State of California. Rohnert Park is situated in the County of Sonoma, in said State, some seven miles south of the City of Santa Rosa.

Reference is hereby made to the application for amended Loan and Grant Contract for Santa Rosa Center Project No. 1 (Calif. R. 45) filed in the San Francisco area office of the Department of Housing and Urban Development. This application was filed by the Urban Renewal Agency of the City of Santa Rosa, a public agency designated by the City of Santa Rosa to carry out the functions, objectives, duties and purposes of the Santa Rosa Urban Renewal Project. Under this [1] application, said Agency seeks to obtain additional financing from the Department in the amount of two million dollars ($2,000,000) for said Project. This additional grant is to be used to finance a downtown regional shopping center which is to be built and developed by Mr. Ernest W. Hahn, a private developer. As part of the scheme to finance the construction of said center, the Agency will authorize the issuance of *tax* allocation bonds. These bonds, it has been estimated, will be paid off in approximately ten (10) years. The said center is to be built on land to be acquired by the Agency in the exercise of the power of eminent domain. This land, when acquired and cleared, will be sold to Mr. Hahn at a substantial discount from the cost of acquisition to the Agency. Thus, it can be seen that the Agency plans to subsidize a private developer in the building of this center by the use of federal and local tax money.

Mr. James K. Burns is and has been for some years past, the Executive Director and Secretary of the Agency. On or about September 23, 1973, Mr. Burns publicly announced that the Department would on or about March 10, 1974, give its final approval to said Project and that thereupon said additional [2] federal financing would become available.

The implementation of this Project through the Department's approval and by the use of federal and local tax funds will cause our client, and its residents and taxpayers great economic injury, measurable in the hundreds of thousands of dollars. The following is a brief outline of the factors that indicate that such economic injury is reasonably certain to ensue if said Project is thus implemented.

1. Our client has planned a regional shopping center which is to be developed with private capital, and which is not to be subsidized by federal, state or local tax moneys. Obviously, our client's project cannot compete with one that is to be funded with public money, and accordingly, our client will not only lose what it has invested in the planned project, but will also be deprived of the tax revenue that its project might have generated when made effective.
2. (a) All the land included in the Agency's Project in Santa Rosa has been frozen at its current [3] de-

pressed assessed valuation. All of the increased property taxes generated by the shopping center to be developed by Mr. Hahn will be pledged to pay for parking garages and other improvements benefitting the shopping center. Thus, while the tax allocation bonds remain unpaid as to interest and principal (approximately ten (10) years), neither Sonoma County nor the local school districts will receive the benefit of the increased taxes to be generated by the center, as these will all be ploughed back into it.

(b) Moreover, the development of this center, as the evidence will show, will require the use of at least fifteen million ($15,000,000) dollars of federal tax money. Additionally, the increased property and other taxes to be thereby created, estimated at approximately two million ($2,000,000) dollars *per year* will, as the evidence will also show, be used for the benefit of the Project *alone*. This sum is in effect diverted tax money which [4] will have to be made up by all taxpayers in the County, including each and every taxpayer in the City of Rohnert Park. Also, this Project will evitably divert retail sales tax producers into Santa Rosa who otherwise might have spent their money in Rohnert Park or elsewhere in the County.

3. On June 11, 1973, the Urban Renewal Agency adopted a resolution of intention. It declared its intention to sell one million, eight hundred thousand ($1,800,000) dollars in tax allocation bonds, the proceeds of which are intended to be used to provide public parking for the purpose of providing the local share of project costs for Project R-45. This

resolution is not sufficient on its face to support any grant whatsoever from the United States Department of Housing and Urban Development. See Urban Renewal Handbok (REM 7216.1).

In connection with all the foregoing, we would like to call your attention to an anomaly that should not be over- [5] looked. In 1972, our client obtained from the United States Economic Development Administration a grant for fifty (50%) percent of the cost of a freeway overpass at the Rohnert Park Expressway (total cost, $800,000). In order to obtain this grant our client was required to demonstrate that as a result of the construction of this overpass, the community would be able to generate additional jobs through the development of neighboring commercially designated property including a *planned regional shopping center* which was to be built as stated above, with *private capital*. Clearly, the grant that the Department may accord to the Santa Rosa Project will entirely defeat the objective sought to be achieved by the Economic Development Administration when it made its grant to our client. We submit that agencies of the United States should not work at cross-purposes.

When Congress enacted the Housing Act of 1949, it commanded that the Department of Housing and Urban Development should exercise its powers so as to encourage and assist the production of *housing* of sound standards, and while so doing, it declared that this objective should be attained whenever possible through private enterprise (42 U.S.C.A. [6] Section 1441). Santa Rosa Center Project No. 1 (Calif. R.45) has nothing to do with either *housing or private enterprise.*

Please consider this letter as an "administrative complaint" opposing said project in its present form, and the Department is hereby requested to hold a hearing in connection therewith at which our client may submit oral and documentary evidence in support thereof.

Sincerely,

COTTON, SELIGMAN & RAY

By .....
William M. Brinton

cc: Mr. James K. Burns

EXHIBIT B

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

SAN FRANCISCO AREA OFFICE
ONE EMBARCADERO CENTER, SUITE 1600
SAN FRANCISCO, CALIFORNIA 94111

REGION IX
450 Golden Gate Avenue
P.O. Box 36003
San Francisco, California 94102

IN REPLY REFER TO:

Dec 27 1973

Mr. William M. Brinton
Cotton, Seligman and Ray
1 MaritimePlaza
San Francisco, California 94111

Dear Mr. Brinton:

This is in response to your request for an "administrative hearing" concerning the Santa Rosa Center Project No. Calif. R-45.

Neither the Administrative Procedures Act, nor any of the program statutes under which the Department of Housing and Urban Development functions provides for the processing of an "administrative complaint" or the holding of an administrative hearing in connection with any application. The Department, however, does consider complaints by interested parties before it acts on matters which come before it.

In accordance with this policy, the Department has scheduled an informal conference for January 15, 1974 at 9:00 A.M. to receive any comments you and your clients may wish to present concerning Project No. Calif. R-45. You should submit your comments in writing to Julian Fitz-

hugh, Program Manager, Area B, by January 11, 1974. At the meeting you will then be given an opportunity to discuss those points with my staff and you will be informed at a later date of our decision on the matters raised.

The meeting will be held at One Embarcadero Center, Sacramento at Battery Streets, San Francisco, on the Seventeenth Floor. If you are unable to attend at the scheduled time, please call Mr. Fitzhugh to try to arrange a mutually acceptable meeting time.

Sincerely,

JAMES H. PRICE
James H. Price
Area Director

April 1973
5th Anniversary U.S. Fair Housing Law
Support It—Work For It

January 11, 1974

Mr. Julian Fitzhugh, Program Manager
San Francisco Area Office, Area E
Department of Housing and Urban Development
One Embarcadero Center, Suite 1600
San Francisco, California 94111

RE: SANTA ROSA CENTER PROJECT
(CALIFORNIA R-45)
ADMINISTRATIVE COMPLAINT

Dear Mr. Fitzhugh:

We represent the City of Rohnert Park.

On October 29, 1973, we mailed to Mr. James Price, Area Director of the Department of Housing and Urban Development, an administrative complaint on behalf of our client concerning Santa Rosa Center Project No. Calif. R-45.

This complaint appears to have been received in Mr. Price's office on October 30, 1973. In it we manifested our client's opposition to an application for an amended Loan and Grant for said project filed with the Department by the Urban Renewal Agency of the City of Santa Rosa whereby the Agency sought additional financing in the approximate amount of $2,000,000 to subsidize the construction and development of a downtown regional shopping center which was to be built by a private developer. The reasons underlying our client's opposition to the application were set forth in detail in the complaint.

Mr. Price responded to this complaint by letter dated *December 27, 1973.* In this letter Mr. Price stated, inter alia, "The Department, however, does consider complaints by interested parties *before it acts on matters which come before it.*" (Emphasis added.) On January 8, 1974, we learned for the first time that the Department had on *November 23, 1973,* [1] approved the application of the Santa Rosa Agency to the extent of $1,800,000.

In his letter Mr. Price informed us, in effect, that pursuant to our complaint he had scheduled an informal conference for January 15, 1974, at 9:00 a.m. to receive any comments we might wish to present concerning said Project No. Calif. R-45. In this connection, Mr. Price directed in his letter that we submit our comments *to you* in writing by January 11, 1974.

Preliminarily we submit to you as part of this written commentary a copy of the said administrative complaint mailed as aforesaid to Mr. Price on October 29, 1973. Please note that a copy of this complaint was mailed to Mr. James K. Burns, the Executive Director and Secretary

of the Urban Renewal Agency of the City of Santa Rosa. We request, therefore, that any written comments which Mr. Burns may have addressed to the Department with respect to our complaint be made available to us at said conference.

At pages 1-3 of our complaint, we state in substance, that our client has conceived a plan to develop a regional shopping center with *private capital,* and that this plan will be brought to naught if the Department grants to the Santa Rosa Agency *tax money* in the approximate sum of $2,000,000 to finance a competing regional shopping center in downtown Santa Rosa which is to be built and developed as aforesaid by a private developer. With respect to this we said, in part, the following in our complaint:

> ". . . Obviously, our client's project cannot compete with one that is to be funded with public money and accordingly, our client will not only lose what it has invested in the planned project, but also will be *deprived of the tax revenue that its project might have generated when made effective.*" (Emphasis added.)

We have attached hereto marked Exhibit A, a schedule [2] showing the tax revenue that our client might derive from its shopping center, but for the subsidy which the Department intends to grant to a private developer at the behest of the Santa Rosa Agency. Moreover, if the Department does in fact grant this subsidy to this developer, the tax revenue will inevitably inure to the benefit of the City of Santa Rosa.

In our complaint we also call attention to the fact that as part of the scheme to finance this downtown Santa Rosa shopping center, the Santa Rosa Agency will authorize the issuance and sale of *tax allocation* bonds, and that this mode of financing will affect every taxing agency and every

taxpayer in the County of Sonoma. In this complaint we likewise show that the Santa Rosa Project will inevitably divert retail sales tax producers into Santa Rosa who otherwise might have spent their money elsewhere in the County. (Complaint, p. 1); paragraphs 2(a) and (b), pp. 3-5.)

For the purpose of intelligently discussing our contentions at the conference with Mr. Price's staff, we will use the tax data which is contained in the following schedules:

1. County of Sonoma Assessed Valuations;
2. Approximate Property Tax Receipts;
3. Sales Tax Distribution.

Copies of these schedules are enclosed for your use.

The Redevelopment Plan *approved* by the City Council of Santa Rosa which is the cornerstone of the Loan and Capital Grant Contract, as amended from time to time, between the Urban Renewal Agency of Santa Rosa and the Department *does not* provide for a downtown regional shopping center. This *approved* plan has been, in effect, abandoned by the Santa Rosa Agency in favor of a new and radically different plan providing for such a center. We are informed that the new and different plan has not received the sanction and approval of either the City Council or the Department. We believe, therefore, that [3] the approval given by the Department to the application for additional financing to subsidize the construction and development of this shopping center is violative of the Housing Act of 1949 [42 U.S.C.A. Sec. 1455(h)].

In our complaint we point out that Congress in enacting the Housing Act of 1949 declared that the Department of Housing and Urban Development should exercise its powers so as to encourage the production of housing and that this objective should be attained whenever possible through

private enterprise (42 U.S.C.A. Sec. 1441). There, we also pointed out that the Santa Rosa shopping center project has nothing to do with either *housing* or *private enterprise.* Accordingly, we submit that the provisions of the Housing Act should be strictly and narrowly construed when applied in connection with the commercial enterprise now being sponsored by the Santa Rosa Agency.

Sincerely,

COTTON, SELIGMAN & RAY

By

RJH
rrj
Enclosures [4]

EXHIBIT A

ESTIMATE OF REVENUE THAT ROHNERT PARK WOULD REALIZE FROM AN UNSUBSIDIZED REGIONAL SHOPPING CENTER DEVELOPED *WITH PRIVATE CAPITAL ALONE.*

I. *Property Taxes*

Assuming a $30,000,000 market value development, which is conservative, this would create an assessed valuation of $7,500,000.

At Rohnert Park's 1973-74 tax rate of $1.57 this would raise in annual property tax revenues for Rohnert Park $117,000

II. *Sales Tax*

750,000 sq. ft. at 75¢ per S/F = $560,000

RECAP OF ESTIMATED REVENUES

Annual City Property Tax	$117,000
Annual Sales Tax	560,000
	$677,000

Note: This does not include other revenues that would be realized such as from business licenses, water and sewer service charges, etc. Also the amount of cigarette tax that the City receives from the the State is partially based on sales tax receipts so that the amount of cigarette taxes the City would receive will also be affected. [1]

COUNTY OF SONOMA

Assessed Valuations

	Assessed(1) Value 1973-74	Sonoma(2) County Population	Assessed Value per Capita	Rank on Per Capita Basis
Cloverdale	$ 5,929,080	3,430	$1,729	9
Cotati	5,387,244	2,500	2,154	7
Healdsburg	13,524,828	5,775	2,342	5
Petaluma	68,547,389	30,650	2,236	6
Rohnert Park	18,288,364	9,725	1,880	8
Santa Rosa	185,833,548	60,700	3,061	3
Sebastopol	12,111,203	4,340	2,790	4
Sonoma	15,452,273	4,790	3,226	2
Sub-Totals	$325,073,929	121,910	$2,666	
Unincorporated Area	$377,631,305	108,790	$3,471	1
Entire County	$702,705,234	230,700	$3,046	

(1) Sonoma County Assessor's Report on 1973-74 Assessed Values issued September, 1973.

(2) Population Figures were furnished by the Department of Finance, Population Research Unit, State of California, and are based on their figures as of April, 1973 as established for SB-90. [2]

COUNTY OF SONOMA

Assessed Valuations

	Assessed(1) Value 1972-73	Sonoma(2) County Population	Assessed Value per Capita	Rank on Per Capita Basis
Cloverdale	$ 5,419,356	3,440	$1,575	9
Cotati	3,702,143	1,650	2,244	6
Healdsburg	13,051,012	5,700	2,290	5
Petaluma	62,385,506	29,500	2,115	7
Rohnert Park	12,288,533	7,450	1,649	8
Santa Rosa	159,777,312	57,300	2,788	3
Sebastopol	10,939,854	4,140	2,642	4
Sonoma	13,771,638	4,850	2,839	2
Sub-Totals	$281,335,354	114,030	$2,467	
Unincorporated Area	$343,092,543	108,570	$3,160	1
Entire County	$624,427,897	222,600	$2,805	

(1) Sonoma County Assessor's Report on 1972-73 Assessed Values Issued September 19, 1972.

(2) Population Figures were furnished by the Department of Finance, Population Research Unit, State of California, and are based on their figures as of February 1, 1972 [2a]

APPROXIMATE PROPERTY TAX RECEIPTS

	Agency	Fiscal Yr. 1971-72	Fiscal Yr. 1972-73
1.	Sonoma County	$19,540,000	$20,270,000(a)
2.	Sonoma County Water Agency	650,150	792,690(a)
3.	Santa Rosa Jr. College District	3,007,000	3,413,000(a)
4.	Santa Rosa School District	1,397,000	1,635,000(a)
5.	Sonoma County Schools Service	1,169,000	1,264,000(a)
6.	City of Rohnert Park	164,000	208,000(b)
7.	Petaluma High School District	2,500,000	3,160,000(c)
8.	Cotati-Rohnert Park School Dist.	465,000	567,000(d)
9.	Petaluma Hospital District	30,000	2,000(a)
10.	Coyote Valley Dam	184,000	174,127

Source: (a) Sonoma County Auditor's Office; (b) Rohnert Park City records; (c) Petaluma High School District office; (d) Cotati-Rohnert Park School District office. [3]

COUNTY OF SONOMA

Sales Tax Distribution

	Adjusted(1) Net Sales Tax 1972-73	Sonoma(2) County Population	Sales Tax Per Capita	Rank on Per Capita Basis
Cloverdale	$ 69,520	3,430	$20.27	7
Cotati	72,731	2,500	29.09	5
Healdsburg	231,726	5,775	40.13	2
Petaluma	679,714	30,650	22.18	6
Rohnert Park	100,511	9,725	10.36	9
Santa Rosa	2,273,447	60,700	37.45	3
Sebastopol	180,901	4,340	41.68	1
Sonoma	168,026	4,790	35.08	4
Sub-Total	$3,776,576	121,910	$30.99	
Unincorporated Area	$2,103,050	108,790	$19.38	8
Entire County	$5,879,626	230,700	$25.49	

Based on 1973-74 Budget

Rohnert Park	$ 105,000	9,725	$10.80

(1) Net Sales Tax Figures were furnished by the State Board of Equalization, State of California, per telephone call on June 22, 1973 and include fiscal year allocation of sales tax paid on taxable transactions in the four quarters of 1972-73 fiscal year.

(2) Population figures were furnished by the Department of Finance, Population Research Unit, State of California, and are based on their figures as of April, 1973 as established for SB-90. [1]

EXHIBIT D

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAN FRANCISCO AREA OFFICE
ONE EMBARCADERO CENTER, SUITE 1600
SAN FRANCISCO, CALIFORNIA 94111

REGION IX
450 Golden Gate Avenue
P.O. Box 36003
San Francisco, California 94102

IN REPLY REFER TO:
9.1G

May 16 1974

Mr. William Brinton
Cotton, Seligman & Ray
One Maritime Plaza
San Francisco, California 94111

Dear Mr. Brinton:

This is in reply to your letters of October 29, 1973 and January 11, 1974 and your comments at the informal conference of January 15, 1974 concerning the Santa Rosa Center Project, No. Calif. R-45.

Your first point in your letter of October 29, 1973 is as follows:

1. Our client has planned a regional shopping center which is to be developed with private capital, and which is not to be subsidized by federal, state or local tax moneys. Obviously, our client's project cannot compete with one that is to be funded with public money, and accordingly, our client will not only lose what it has invested in the planned project, but will also be deprived of the tax revenue that its project might have generated when made effective.

It is our understanding that you represent the local government of the City of Rohnert Park. If no local tax money has been or is to be used to develop or make possible a regional shopping center in Rohnert Park, we fail to see how your client, Rohnert Park, can have invested any money in this project since cities raise the money which they spend through taxes.

Nevertheless, the question of any possible loss of tax revenue by Rohnert Park is a question of state and local law. The State of California has chosen to pass its Community Redevelopment Law, California Health and Safety Code, §§ 33000 et seq., and the City of Santa Rosa has chosen to undertake a redevelopment project pursuant to that law. The tax consequences of these actions were arranged by the California state government, and HUD has no power or desire to interfere with the state tax system. [1]

The second point of your letter of October 29, 1973 is as follows:

2. (a) All the land included in the Agency's Project in Santa Rosa has been frozen at its current depressed assessed valuation. All of the increased property taxes generated by the shopping center to be developed by Mr. Hahn will be pledged to pay for parking garages and other improvements benefitting the shopping center. Thus, while the tax allocation bonds remain unpaid as to interest and principal (approximately ten (10) years), neither Sonoma County nor the local school districts will receive the benefit of the increased taxes to be generated by the center, as these will all be ploughed back into it.

   (b) Moreover, the development of this center, as the evidence will show, will require the use of at

least fifteen million ($15,000,000) dollars of federal tax money. Additionally, the increased property and other taxes to be thereby created, estimated at approximately two million ($2,000,000) dollars *per year* will, as the evidence will also show, be used for the benefit of the Project *alone*. This sum is in effect diverted tax money which will have to be made up by the taxpayers in the County, including each and every taxpayer in the City of Rohnert Park. Also, this Project will evitably divert retail sales tax producers into Santa Rosa who otherwise might have spent their money in Rohnert Park or elsewhere in the County.

Once again, you are challenging the provisions of state law. HUD cannot change those provisions and therefore has no power to change the circumstances of which you complain.

Your third point of your letter of October 29, 1973 is as follows:

3. On June 11, 1973, the Urban Renewal Agency adopted a resolution of intention. It declared its intention to sell one million, eight hundred thousand ($1,800,000) dollars in tax allocation bonds the proceeds of which are intended to be used to provide public parking for the purpose of providing the local share of project costs for Project R-45. This resolution is not sufficient on its face to support any grant whatsoever from the United States Department of Housing and Urban Development. See Urban Renewal Handbook (RHM 7216.1). [2]

The Department of Housing and Urban Development has not relied on a resolution of intention of the Local Agency.

The City and Redevelopment Agency have agreed to provide the local share of Project Calif. R-45, by adopting a Cooperation Agreement which supports the total amount of loan and grant funds committed to the Santa Rosa Agency under Contract No. Calif. R-45(LG), as amended. Such a Cooperation Agreement is the assurance of local share required by the Urban Renewal Handbook, RHM 7216.1.

You also point out the Economic Development Administration granted $400,000 to Rohnert Park in 1972 for construction of a freeway overpass. At the time the EDA grant was made, Santa Rosa's renewal project had been in progress for a number of years. If you feel the EDA spent its money unwisely in trying to divert growth from Santa Rosa where HUD's project was underway, you should take your complaint to them. HUD has aided Santa Rosa's redevelopment program since the early 1960s and sees no reason to terminate its aid because of EDA's later action.

In reference to your last point in your letter of October 29, 1973, § 110 of the Housing Act of 1949, as amended permits nonresidential renewal projects if the Local Agency determines that such redevelopment is necessary. Thus the determination of the Santa Rosa Renewal Agency to redevelop a nonresidential project must be accepted by the Department of Housing and Urban Development. The land for the shopping center will be bought, developed, and owned by a private corporation, thus demonstrating the incorrectness of your assertion that private enterprise will not be involved.

In your letter of January 11, 1974 you again raised the points concerning state tax law and the question of housing and private enterprise in the renewal project. Those points have been answered above.

In our discussion of January 15, 1974, you first contended that the Santa Rosa Renewal Agency had not adequately guaranteed its local share to support the project. As stated above, the amended Cooperation Agreement is adequate under the terms of the Urban Renewal Handbook to guarantee the local share of the project. [3]

You also challenged the validity of the Cooperation Agreement as a matter of state law, claiming it violated the provisions of Article XIII, Section 40 of the California Constitution since it had not been approved by a two-thirds vote of the voters of Santa Rosa.

In the Cooperation Agreement, as amended, the City has agreed to make up any deficiencies in the financing of the local share if the Redevelopment Agency is unable to provide the local share through its own efforts to finance the required improvements. This liability of the City is contingent on failure of the Agency to provide the local share. At the present time its amount is uncertain, as is the time at which it might become due. Such a contingent obligation does not become a debt until the contingency occurs. *McBean v. City of Fresno* 112 Cal. 159, 168 (1896); Ops. Atty. Gen. 21 (January 10, 1952).

The Cooperation Agreement provides that the City may pay any deficiencies that may arise eventually from its contingent liability "from whatever source it may legally do so." Certain methods of financing, such as issuance of revenue bonds, could be used to pay the debt if it arises and such bonds are not an indebtedness within the meaning of Article XIII, Section 40 of the California Constitution—*City of Santa Clara v. Von Raesfield* 3 Cal. 3rd 239, 247 (1970).

The Department of Housing and Urban Development therefore accepts the Cooperation Agreement as creating a

valid contingent liability on the City of Santa Rosa under the procedures by which the City and Redevelopment Agency have adopted it.

Your second point again challenged the tax provisions of California law. You are referred to our above answer on the same subject.

Your third contention was that the amendment to the Redevelopment Plan in 1970 was not valid because the City did not make a finding that the project was economically feasible as required by Section 33367 of the California Health and Safety Code.

Section 33367 applies to initial adoption of a plan. Amendments to a plan are governed by Sections 33450-33458, and no such finding is required under those sections. Therefore the amendment is not invalid. [4]

Your fourth contention was that Santa Rosa was not proceeding in accordance with its adopted and amended Urban Renewal Plan.

The Urban Renewal Plan for Calif. R-45, as amended, permits the land to be used for commercial facilities such as those which will make up the proposed shopping center.

Section C, Land Use Plan, provides for three Central Business land use zones: Central Business "C", Central Business "D", and Central Business "E". Each of these land use areas permits among other uses, retail stores; personal and business service establishments; restaurants and other places serving food and drink; and public and private parking lots. None of the uses included in the proposed shopping center are in conflict with the permitted land uses of the Urban Renewal Plan.

The plan does not need to be amended to allow the use of project land for a shopping center. Thus this contention is also without merit.

Your fourth point also raises a contention of possible fraud with respect to the issuance of tax allocation bonds by the Agency. This is a question for bond counsel and need not concern HUD, since HUD relies on the Cooperation Agreement's pledge to provide the local share from any legal source. Thus if one method were to be foreclosed, the City and Agency could provide the local share by another means.

You also contend that the Urban Renewal Plan is not in conformance with the City's General Plan and Central District Development Plan.

There is no language in either plan which forbids development of a Regional Shopping Center. The documents were prepared six years ago, before the Urban Renewal Plan was amended and were designed to allow for subsequent changes in specific land uses.

There is no indication that the Planning Commission of the City of Santa Rosa commented that the amended Renewal Plan would conflict with the general plan. Under Section 33455 of the Health and Safety Code, a lack of adverse comment by the commission is all that is required. Thus the plan has been validly amended and your assertions are incorrect.

Your fifth contention is again that the local share has not been adequately provided. You are hereby referred to our earlier answer on this same issue. [5]

If the Clean Air Act were to prevent the building of a garage, the Agency and City would be bound to provide the local share by some other means under the terms of the Cooperation Agreement.

Your sixth contention merely restates your concern that in 1972 the EDA granted your client, the City of Rohnert Park, $400,000 to build a freeway underpass, and that such

grant promoted a policy that worked counter to the purposes of a renewal grant and loan program to Santa Rosa that HUD had already been funding for a number of years. Once again you are referred to our earlier answer on this point.

Your seventh and final contention is that HUD is in violation of the National Environmental Policy Act because it has not completed an Environmental Impact Statement on the Santa Rosa Center Project No. Calif. R-45.

In compliance with the National Environmental Policy Act the Department of Housing and Urban Development is preparing an Environmental Impact Statement on the Santa Rosa Center, Project Calif. R-45. A group of technical and administrative staff members, with expertise in all areas of environmental and program concerns have formed an Environmental Task Force to prepare the statement. The Task Force received the Applicant's Environmental Information form, completed by the Santa Rosa Agency, in March of 1974, and at the present time the Task Force is in the process of evaluating this information and preparing an Environmental Impact Statement.

On April 4, 1974 the Department of Housing and Urban Development received an application from the Santa Rosa Redevelopment Agency requesting an increase in both the loan and grant in the amount of $435,868 for a total loan of $16,933,177 and a total grant of $11,356,599. The purpose of this request is to provide funds to pay the interest costs involved in refinancing the project notes through the completion of the project. Processing of this application is presently being undertaken.

The project notes finance acquisition and site preparation activities but not the development of structures on the site. Thus refinancing of project notes or providing more

money for interest costs on the notes will do nothing to further one particular reuse plan over any other; the Department of HUD will still have substantial ability to eliminate or mitigate any adverse environmental effects determined during the environmental clearance process prior to approval of disposition and plan change activities, which are the activities that determine the actual reuse of project land.

The Department of Housing and Urban Development is also processing a land disposition contract which the Santa Rosa Redevelopment Agency [6] has submitted for its approval and it is anticipated that the Redevelopment Agency will request HUD to approve a further Amendment to the Redevelopment Plan. The Department of HUD will not approve any further land disposition contracts or plan changes for the proposed shopping center use or for any other use in the 31.2 acre area added by the 1970 Contract and Plan Amendments until an Environmental Impact Statement has been prepared in accordance with the National Environmental Policy Act.

In conclusion, we have reviewed all of your contentions in your letter of October 29, 1973 and January 11, 1974 and at the informal conference of January 15, 1974. As stated above, certain HUD actions will not be taken until an Environmental Impact Statement is completed on the Santa Rosa Center Project. We have discussed your other complaints and contentions above and have found each of them to be without merit. We therefore find that you have raised no issues which will cause us to halt or delay any activities of the U.S. Department of Housing and Urban Development or the Santa Rosa Renewal Agency with respect to the Santa Rosa Center Project No. Calif. R-45, except those

outlined above as being delayed until completion of the Environmental Impact Statement.

Sincerely,

STEVEN B. SACHS
for Julian A. Fitzhugh
Program Manager, Area B [7]

Appendix B

JAMES L. BROWNING, JR.
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Attorneys for Defendant James T. Lynn

United States District Court for the Northern District of California

CIVIL NO. C-74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

ANSWER OF JAMES T. LYNN AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

JAMES T. LYNN, Secretary of the United States Department of Housing and Urban Development, defendant herein, by his undersigned attorneys answer the complaint on file herein as follows:

I

Defendant denies each and every allegation in Paragraph I of the Complaint.

II

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first paragraph of Paragraph II of the Complaint and therefore denies same.

(a), (b) and (c). Defendant admits the allegations of subparagraphs (a), (b), and (c) of said Paragraph II.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph II(d) of the Complaint and therefore denies same. [1]

III

There is no Paragraph III in the Complaint.

IV

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph IV and therefore denies same.

V

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph V and therefore denies same.

VI

(a) Defendant answers Paragraph VI(a) as follows: Defendant admits the allegations set forth on Page 4, Line 29 to Page 5 to the first period on Line 6. Defendant admits the allegation that there is no plan for permanent family housing; however, alleges that there is no requirement therefor. Defendant denies each and every other allegation in said Paragraph VI(a).

(b) Defendant denies that part of Paragraph VI(b) alleging the United States will defray three-fourths of the net costs of the project, on the contrary the United States will defray three-fourths of the net "eligible" costs not to exceed the amount in the Loan Grant Contract. In all other respects, the defendant admits the substantial truth of said subparagraph except that the loan and grant contract was entered on June 6, 1962.

(c) Defendant admits that the contract was amended at least eight (8) times as alleged in Paragraph VI(c) and defendant alleges that he is now in the process of preparing an Environmental Impact Statement.

VII

Defendant denies the first sentence of Paragraph VII of the Complaint and as to the remainder of said paragraph Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations as pleaded therein and therefore denies same. [2]

VIII

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VIII and therefore denies same.

IX

(a-i) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph IX (a) through (i) and therefore denies same.

(j) Defendant denies the allegations of Paragraph IX(j) on the basis that no federal funds are involved.

X

(a) Defendant admits that portion of the allegation of Paragraph X(a) commencing with the word "Plaintiff" on Page 11, Line 17 through and including Line 22. By way of further answer to said subparagraph (a), defendant alleges that he has no knowledge about Plaintiff's city's awareness of the provisions of the 8th Amendatory and specifically denies that the process of the application was to defray costs incurred in contract between defendants' agency and developer.

(b) Defendant admits that on November 27, 1974, the 8th Amendatory to the Loan and Grant Contract was executed.

(c) and (d) Defendant admits the allegations of Paragraph X(c) and (d).

(e) Defendant admits that the letter of May 16, 1974 referred to in Paragraph X(e) is a true copy but it denies that he admitted that he was required to prepare an Environmental Impact Statement before making further funds available.

XI

(a) By way of answer to Paragraph XI(a) Defendant alleges that he is presently in the process of preparing an Environmental Impact Statement and that since May 1974 he did cause to have advanced additional funds to defendant agency in the sum in excess [3] of $500,000.00, but said sums were advanced under amendatory land and grant contracts preceding May 1974.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph X(b) and therefore denies same.

(c) Defendant denies the allegations in Paragraph XI(c).

XII

Defendant denies the allegations in Paragraph XII.

AFFIRMATIVE DEFENSES

As Affirmative Defenses to the Complaint, defendant alleges as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This is in fact a suit against the United States to which it has not consented, and therefore the Court lacks jurisdiction over the United States and its officer sued herein as defendant.

THIRD DEFENSE

Plaintiff does not have standing to bring this action.

FOURTH DEFENSE

Plaintiff is not entitled to maintain this suit by reason of laches.

WHEREFORE, Defendant prays:

1. That the Complaint be dismissed;
2. That Plaintiff take nothing by its complaint herein;
3. That all specific relief against defendant be denied;
4. The Judgment be entered in favor of defendant and against plaintiff; [4]
5. That defendant may have Judgment for costs;
6. For such other and further relief as the Court deems proper.

DATED: January 20, 1975

JAMES L. BROWNING, JR.
United States Attorney

By PAUL E. LOCKE
Paul E. Locke
Assistant United States
Attorney

Attorneys for Defendant
James T. Lynn, Secretary of
the United States Department
of Housing and Urban
Development [5]

Appendix C

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Attorneys for Defendant, Ernest W. Hahn, Inc.

United States District Court
Northern District of California

Civil Action No. C 74 2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
v.
James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

ANSWER OF ERNEST W. HAHN, INC. TO COMPLAINT

Defendant, Ernest W. Hahn, Inc., a California corporation, hereinafter sometimes referred to as Developer, by its attorneys, for itself alone, answers the Complaint on file herein by admitting, denying and alleging:

1. Denies each and every allegation contained in paragraph I.

2. In answer to paragraph II, admits that plaintiff City of Rohnert Park, hereinafter sometimes referred to as Plaintiff is, and at the times mentioned in the complaint was, a municipal corporation organized pursuant to the Government Code of the State of California and is situated in the County of Sonoma, State of California. Denies that plaintiff, its [1] inhabitants, taxpayers, or property owners, have been injured in their business or property, or are threatened with injury to their business or property, as a result of any acts or conduct of defendants.

(a) Admits that James T. Lynn was the Secretary of the United States Department of Housing and Urban Development, at the time of the filing of the complaint herein, and that some of the duties of said Secretary are, and were at the times mentioned in the complaint, performed by subordinates based in the San Francisco area office of the Department which is located in the Northern District of California. Admits that among such subordinates of the Secretary based in the San Francisco area of the Department are James H. Price, Area Director; Julian A. Fitzhugh, Program Manager, Area B; and Stephen B. Sachs, Assistant Program Manager, Area B.

(b) Admits that the City of Santa Rosa is, and was at all times mentioned in the complaint, a municipal corporation organized under a freeholders charter adopted and amended pursuant to the provisions of the Constitution and laws of the State of California, and that the City of Santa Rosa is situated in the County of Sonoma, State of California.

(c) Admits and allege that the Urban Renewal Agency of the City of Santa Rosa, hereafter the Agency, is, and

was at all times mentioned in the complaint, a public body, corporate and politic, organized and existing by virtue of Resolution No. 5552 of the City Council of the City of Santa Rosa, dated March 27, 1958, adopted pursuant to the provisions of Division 24 of the Health and Safety Code of the State of California and the Charter of the City of Santa Rosa and that said Urban Renewal Agency has its office in the City of Santa Rosa.

(d) Admits that Ernest W. Hahn, Inc. is, and was at the times mentioned in the complaint, a California corporation [2] having an office for the transaction of business in the City of Hawthorne, County of Los Angeles, State of California.

Except as expressly admitted, alleged, and denied herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of the complaint.

3. In answer to Paragraph IV, admits that the City of Santa Rosa is located approximately seven miles north of the City of Rohnert Park and that United States Highway 101 is a principal means of vehicular travel to the north or south from both cities and in some instances the most convenient means of travel to the north or south from such cities.

(a) Admits that the City of Rohnert Park has purported to adopt a general plan for the City and that such plan allows for the development of land for commercial purposes on both sides of U.S. Highway 101 in the area of the Rohnert Park Expressway, hereafter the Rohnert Park site. Denies that the development of the Rohnert Park site has been, or will be, financed entirely from private capital.

(b) Admits that on or about September 3, 1974, the City Council of the City of Rohnert Park purported to rezone portions of the property within the Rohnert Park site but

denies that said purported rezoning complied with, or was consistent with, the requirements of Section 65860 of the Government Code or other applicable laws of the State of California.

Except as expressly admitted or denied herein alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the complaint.

4. Denies that the Agency has planned a federally subsidized shopping center and denies that such a shopping center planned by the Agency has inhibited potential developers of the [3] Rohnert Park site from proceeding with such development. Except as expressly denied herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of the complaint.

5. Admits and alleges that the City Council of the City of Santa Rosa, by its Ordinance No. 1036 dated December 5, 1961, adopted a redevelopment plan for the redevelopment project known as Santa Rosa Center Project (Calif. R-45), hereafter the Project; that the area encompassed by the Project, as described in the presently effective amended redevelopment plan, approaches to within approximately one block of U.S. Highway 101; that the redevelopment plan for the Project has been amended from time to time and that amendments to said plan were adopted by the City Council of the City of Santa Rosa on or about March 10, 1970, and October 29, 1974; that the Agency is, and has been at all times mentioned in the complaint, responsible for carrying out the redevelopment plan for the Project on behalf of the City of Santa Rosa; that since 1971 the Agency has been considering proposals for the development of a shopping center within the Project area; that on

or about March 27, 1972, the Agency entered into an agreement with defendant Developer, hereafter the Negotiations Agreement, whereby the Agency agreed to negotiate with no developer except the Developer for a period specified by the Negotiations Agreement, with respect to the development of a shopping center within the Project area; that the Developer has prepared a proposal to develop approximately 30.05 acres, exclusive of streets, within the Project as a shopping center, hereafter the shopping center site; that the Agency has acquired and cleared some of the property within the shopping center site with funds furnished to the Agency by the defendant Secretary; that the amendment of the redevelopment plan for the Project adopted by the City Council of the City of Santa Rosa on October [4] 29, 1974, enlarged the Project area to include a portion of the shopping center site not previously within the Project area; that on October 29, 1974, the Agency approved a land disposition agreement between the Agency and the Developer, hereafter the Land Disposition Agreement; and that present proposals for the implementation of the redevelopment plan for the Project do not contemplate the development of permanent family housing within the Project area. Defendant alleges that the redevelopment plan is not required by law or regulation to make provision for permanent family housing and alleges that no federal funds have been used, or will be used, to acquire or clear property located within the area added to the Project area by the amendment to the redevelopment plan adopted October 29, 1974.

Except as herein expressly admitted or alleged, denies each and every allegation contained in Paragraph VI(a) of the complaint.

(a) In answer to Paragraph VI(b) defendant admits that portion of Paragraph VI(b) commencing with the word

"The" on page 5, line 21, and ending with the words "Home Finance Agency" on page 5, line 29, and admits that portion of Paragraph VI(b) commencing with the word "This" on page 6, line 1, and ending with the figure "$2,625,023." on page 6, line 5. Defendant alleges that said Loan and Grant Contract provided that the United States would defray three-fourths (¾) of the eligible costs of the redevelopment project, such federal share of eligible project costs not to exceed the amounts specified by the Loan and Grant Contract, and allege that, by approval of the original Loan and Grant Contract, the Housing and Home Finance Agency authorized federal loans and grants for redevelopment within the entire Project area, which at the time said contract was approved in March of 1962 encompassed approximately 40 acres.

Except as expressly admitted or alleged herein, [5] defendant denies each and every allegation contained in Paragraph VI(b) of the complaint.

(b) Defendant alleges that the Loan and Grant Contract has been amended nine times and that eight of such amendments increased the amount of the temporary loan and seven of such amendments increased the amount of the Project grant. Defendant admits that the eighth amendment, executed on or about November 27, 1973, increased the temporary loan to a total of $16,557,309 and the Project grant to a total of $12,236,717 and that the sixth amendment to the Loan and Grant Contract, dated September 14, 1970, increased the total Project grant from $3,263,332 to $8,318,497 and increased the temporary loan from $5,908,880 to $13,223,939. Defendant alleges that a portion of the increase in federal funding made by the sixth amendment to the Loan and Grant Contract was intended and used for the purpose of acquiring, clearing, and preparing for development, property with-

in the area of that portion of the Project known as Phase II, which area includes approximately 21.21 acres of the shopping center site. Defendant admits that September 14, 1970 is after the effect of the National Environmental Protection Act (NEPA), Defendant alleges that the Defendant Secretary is presently preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds, but denies that the preparation of an environmental impact statement for the Project is required by the National Environmental Protection Act.

Except as expressly admitted, denied, or alleged herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI of the complaint.

6. Defendant alleges that the Land Disposition Agreement provides that the Developer will construct a shopping center containing approximately 713,500 square feet of retail [6] sales space; that the Agency has acquired and cleared some of the property within the shopping center site; that the Agency, to date has expended approximately $4,980,430.00, for acquisition, and $119,919.00 for clearance of such property; that the consideration to be received by the Agency from the Developer for the property of the shopping center site exceeds the fair market value of such property; that as part of the consideration for such property Developer is required by the Land Disposition Agreement to construct public parking facilities having an estimated cost in excess of $5,000,000 to bear the costs of constructing such facilities *in excess of $2,000,000* to reconvey or dedicate to the Agency or the City of Santa Rosa certain parts of such property for public parking purposes, *and to make annual payments of $401,000 to the City of Santa Rosa.* Defendant alleges that the Land Disposition

Agreement has been submitted to Defendant Secretary but has not been approved, or consented to, by Defendant Secretary. [7]

Except as expressly alleged herein, denies each and every allegation contained in Paragraph VII of the complaint.

7. Denies each and every allegation contained in Paragraph VIII.

8. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IX(a), IX(b), IX(c), IX(d), IX(e), IX(f), and IX(g) of the complaint.

(a) Admits that there are now approximately 748,000 square feet of general merchandise space in the City of Santa Rosa and allege that the shopping center proposal of the Developer provides for the construction of approximately 356,500 square feet of general merchandise space. Admits that the shopping center proposal provides for the construction of 347,000 square feet of retail space other than general merchandise space. Except as expressly admitted or alleged herein, denies each and every allegation contained in Paragraph IX(h) of the complaint.

(b) Alleges that the shopping center proposal provides for the construction of 1,256 off-street parking stalls for patrons of the shopping center; that the Land Disposition Agreement provides the Developer will construct a parking structure having estimated cost in excess of $5,000,000.00 and a cost to the Agency not to exceed $2,000,000.00; that the Agency presently intends to defray the local share of total cost for the Project, including costs related to parking facilities, by the issuance of Agency bonds, which may be parking lease revenue bonds, tax allocation bonds, or a combination of both such bonds; that pursuant to Article XIII, Section 19 of the California Constitution, the California

Community Redevelopment Law (Health and Safety Code Section 3600 et seq.) and the redevelopment plan for the Project, the Agency is authorized to issue tax allocation bonds and to have paid into a special fund of the Agency [8] established to pay the principal and interest on loans, monies, advanced to or indebtedness incurred by the Agency to finance or refinance the Project in whole or in part a portion of the property tax revenues collected on property within the Project area; and that the parking structure will be operated and maintained by the City of Santa Rosa consistent with the operation and maintenance of all other off-street parking facilities owned by the City in downtown Santa Rosa. Except as expressly admitted or alleged herein, denies each and every allegation contained in Paragraph IX(i) of the complaint.

(c) Alleges that the Land Disposition Agreement between the Agency and the Developer provides that the Agency will acquire, and sell to the Developer, certain land within the Project area not presently owned by the Agency and that the anticipated cost of acquisition and improvements for such land is $4,959,000 plus $332,100 for site clearance; that part of such property is within the area added to the Project area by the amendment to the redevelopment plan adopted by the City Council of the City of Santa Rosa on October 29, 1974; that the terms of the Land Disposition Agreement provide that the property for the shopping center site within the area added to the Project area by said amendment will be conveyed to the Developer for $1,000,000.00, or equivalent or greater consideration, at the option of the Agency.

Except as admitted or alleged herein, denies each and every allegation contained in Paragraph IX(j) of the complaint.

9. Denies that the implementation or performance of the Land Disposition Agreement will frustrate the planning or

development of a regional retail center at the Rohnert Park site or injure the City of Rohnert Park. Admits that on or about November 27, 1973, the Defendant Secretary approved the Agency's application for an amendment to the Loan and Grant Contract. [9]

Except as admitted herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X of the complaint.

10. Defendant alleges that the Defendant Secretary is presently in the process of preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds and that on or about November 1, 1974, the Agency received a capital grant progress payment in the amount of $773,982.00 and a relocation assistance payment in the amount of $335,965.00 such sums being monies allocated to the Agency by amendments to the Loan and Grant Contract previously approved by the Defendant Secretary.

(a) Admits that on or about September 24, 1974, the Agency and the City of Santa Rosa filed an action in the Superior Court of the State of California for the County of Sonoma against the City of Rohnert Park. Denies, on information and belief, that the purpose of said action was to permanently enjoin development at the Rohnert Park site, and that the pleadings on file in said action disclose that the Agency and the City of Santa Rosa claim the sole and exclusive right to develop a regional shopping center in the County of Sonoma or claim the erosion of the said alleged right would result in an irreparable injury to them, and that the action is without merit or was brought to deter the Plaintiff from authorizing and implementing the develop-

ment of the Rohnert Park site in accordance with its general plan.

Alleges, on information and belief, that the purpose of said action by the Agency and the City of Santa Rosa was to determine the adequacy, under California law, of an Environmental Impact Report prepared in connection with a zoning change for property located at the Rohnert Park site, and, if such Environmental Impact Report was determined by the Court to be inadequate, to enjoin a zoning change with respect to certain [10] property located within the Rohnert Park site until an adequate Environmental Impact Report had been prepared; and alleges, on information and belief, that the pleadings and papers on file with the Court in such action disclose that the Association of Area Governments concluded a regional shopping center should not be developed at the Rohnert Park site because of adverse consequences to the environment of the area.

Denies, on information and belief, that the cost of litigating such suit on behalf of the Agency and the City of Santa Rosa is, or was, defrayed with funds obtained by the City of Santa Rosa or the Defendant Secretary.

Except as expressly admitted, denied, and alleged herein, denies each and every allegation contained in Paragraph XI of the complaint.

11. Denies each and every allegation contained in Paragraph XII.

FIRST DEFENSE

The complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

SECOND DEFENSE

The complaint fails to allege a beneficial interest which would entitle plaintiff to bring suit against defendants, or any of them under the Sherman Act, the Clayton Act, the Housing Act of 1949, the Administrative Procedure Act, or any other statute or legal entitlement.

THIRD DEFENSE

Plaintiff's claim is barred by laches.

WHEREFORE, this answering defendant prays that plaintiff take nothing by reason of its complaint, for costs of suit incurred herein and for such other and further relief as [11] the Court deems just and proper.

BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens

Attorney for Defendant,
Ernest W. Hahn, Inc. [12]

Appendix D

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Attorneys for Defendants City of
Santa Rosa and Urban Renewal Agency
of the City of Santa Rosa

United States District Court
Northern District of California

No. C74 2429RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
vs.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

ANSWER OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

Defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (hereafter collectively referred to as "Defendants") answer the complaint herein as follows:

I

Defendants deny each and every allegation contained in Paragraph I.

II

Defendants admit that plaintiff City of Rohnert Park (hereafter sometimes referred to as "Plaintiff") is, and at the times mentioned in the complaint was, a municipal corporation organized [1] pursuant to the Government Code of the State of California and that Plaintiff is situated in the County of Sonoma, State of California. Defendants deny that Plaintiff, its inhabitants, taxpayers, or property owners, have been injured in their business or property, or are threatened with injury to their business or property, as a result of any acts or conduct of Defendants.

(a) Defendants admit that James T. Lynn was the Secretary of the United States Department of Housing and Urban Development, at the time of the filing of the complaint herein, and that some of the duties of said Secretary are, and were at the times mentioned in the complaint, performed by subordinates based in the San Francisco area office of the Department which is located in the Northern District of California. Defendants admit that among such subordinates of the Secretary based in the San Francisco area of the Department are James H. Price, Area Director;

Julian A. Fitzhugh, Program Manager, Area B; and Stephen B. Sachs, Assistant Program Manager, Area B.

(b) Defendants admit that the City of Santa Rosa is, and was at all times mentioned in the complaint, a municipal corporation organized under a freeholders charter adopted and amended pursuant to the provisions of the Constitution and laws of the State of California and that the City of Santa Rosa is situated in the County of Sonoma, State of California.

(c) Defendants admit and allege that the Urban Renewal Agency of the City of Santa Rosa (hereafter "the Agency") is, and was at all times mentioned in the complaint, a public body, corporate and politic, organized and existing by virtue of Resolution No. 5552 of the City Council of the City of Santa Rosa, dated March 27, 1958, and adopted pursuant to the provisions of Division 24 of the Health and Safety Code of the State of California and the Charter of the City of Santa Rosa and that said Urban Renewal Agency has its office in the City of Santa Rosa. [2]

(d) Defendants admit that Ernest W. Hahn, Inc. (hereafter "the Developer") is, and was at the times mentioned in the complaint, a California corporation, having an office for the transaction of business in the City of Hawthorne, County of Los Angeles, State of California.

Except as expressly admitted, alleged, and denied in Paragraph II of this answer, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of the complaint.

III

The complaint contains no Paragraph III.

IV

(a) Defendants admit that the City of Santa Rosa is located approximately seven miles north of the City of Rohnert Park and allege that United States Highway 101 is a principal means of vehicular travel to the north or south from both cities and in some instances the most convenient means of travel to the north or south from such cities.

(b) Defendants admit that the City of Rohnert Park has purported to adopt a general plan for the City and that such plan allows for the development of land for commercial purposes on both sides of U.S. Highway 101 in the area of the Rohnert Park Expressway (hereafter "the Rohnert Park site"). Defendants deny that the development of the Rohnert Park site has been, or will be, financed entirely from private capital.

(c) Defendants admit that on or about September 3, 1974, the City Council of the City of Rohnert Park purported to rezone portions of the property within the Rohnert Park site but deny that said purported rezoning complied with, or was consistent with, the requirements of Section 65860 of the Government Code or other applicable laws of the State of California.

Except as expressly admitted or denied in Paragraph IV of this [3] answer, Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the complaint.

V

Defendants deny that the Agency has planned a federally subsidized shopping center and deny that such a shopping center planned by the Agency has inhibited potential developers of the Rohnert Park site from proceeding with such

development. Except as expressly denied in Paragraph V of this answer Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of the complaint.

VI

(a) Defendants admit and allege that the City Council of the City of Santa Rosa, by its Ordinance No. 1036 dated December 5, 1961, adopted a redevelopment plan for the redevelopment project known as Santa Rosa Center Project (Calif. R-45) (hereafter "the Project"); that the area encompassed by the Project, as described in the presently effective amended redevelopment plan, approaches to within approximately one block of U.S. Highway 101; that the redevelopment plan for the Project has been amended from time to time and that amendments to said plan were adopted by the City Council of the City of Santa Rosa on or about March 10, 1970, and October 29, 1974; that the Agency is, and has been at all times mentioned in the complaint, responsible for carrying out the redevelopment plan for the Project on behalf of the City of Santa Rosa; that since 1971 the Agency has been considering proposals for the development of a shopping center within the Project area; that on or about March 27, 1972, the Agency entered into an agreement with the Developer (hereafter "the Negotiations Agreement") whereby the Agency agreed to negotiate with no developer except the Developer, for a period specified by the Negotiations [4] Agreement, with respect to the development of a shopping center within the Project area; that the Developer has prepared a proposal to develop approximately 30.05 acres, exclusive of streets, within the Project as a shopping center (hereafter "the shopping center site"); that the Agency has acquired and

cleared some of the property within the shopping center site with funds furnished to the Agency by the defendant Secretary; that the amendment of the redevelopment plan for the Project adopted by the City Council of the City of Santa Rosa on October 29, 1974, enlarged the Project area to include a portion of the shopping center site not previously within the Project area; that on October 29, 1974, the Agency approved a land disposition agreement between the Agency and the Developer (hereafter "the Land Disposition Agreement"); and that present proposals for the implementation of the redevelopment plan for the Project do not contemplate the development of permanent family housing within the Project area. Defendants allege that the redevelopment plan is not required by law or regulation to make provision for permanent family housing and allege that no federal funds have been used, or will be used, to acquire or clear property located within the area added to the Project area by the amendment to the redevelopment plan adopted October 29, 1974.

Except as expressly admitted or alleged in Paragraph VI(a), Defendants deny each and every allegation contained in Paragraph VI(a) of the complaint.

(b) Defendants admit that portion of Paragraph VI(b) commencing with the word "The" on page 5, line 21, and ending with the words "Home Finance Agency" on page 5, line 29, and admit that portion of Paragraph VI(b) commencing with the word "This" on page 6, line 1, and ending with the figure "$2,625,023." on page 6, line 5. Defendants allege that said Loan and Grant contract provided that the United States would defray three-fourths [5] (¾) of the eligible costs of the redevelopment project, such federal share of eligible project costs not to exceed the amounts specified by the Loan and Grant Contract, and allege that,

by approval of the original Loan and Grant Contract, the Housing and Home Finance Agency authorized federal loans and grants for redevelopment within the entire Project area, which at the time said contract was approved in March of 1962 encompassed approximately 40 acres.

Except as expressly admitted or alleged in Paragraph VI(b) of this answer, Defendants deny each and every allegation contained in Paragraph VI(b) of the complaint.

(c) Defendants allege that the Loan and Grant Contract has been amended nine times and that eight of such amendments increased the amount of the temporary loan and seven of such amendments increased the amount of the Project grant. Defendants admit that the eighth amendment, executed on or about November 27, 1973, increased the temporary loan to a total of $16,557,309 and the Project grant to a total of $12,236,717 and that the sixth amendment to the Loan and Grant Contract, dated Sepember 14, 1970, increased the total Project grant from $3,263,332 to $8,318,497 and increased the temporary loan from $5,908,880 to $13,223,939. Defendants allege that a portion of the increase in federal funding made by the sixth amendment to the Loan and Grant Contract was intended and used for the purpose of acquiring, clearing, and preparing for development, property within the area of that portion of the Project known as Phase II, which area includes approximately 21.21 acres of the shopping center site. Defendants admit that September 14, 1970 is after the effect of the National Environmental Protection Act (NEPA). Defendants allege that the Defendant Secretary is presently preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds, but deny that the preparation of an environmental [6] impact statement for the Project is required by the National Environmental Protection Act.

Except as expressly admitted, denied, or alleged in Paragraph VI of this answer, Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI of the complaint.

VII

Defendants allege that the Land Disposition Agreement provides that the Developer will construct a shopping center containing approximately 713,500 square feet of retail sales space; that the Agency has acquired and cleared some of the property within the shopping center site; that the Agency, to date, has expended approximately $4,980,430.00, for acquisition, and $119,919.00 for clearance, of such property; that the consideration to be received by the Agency from the Developer for the property of the shopping center site exceeds the fair market value of such property; that as part of the consideration for such property Developer is required by the Land Disposition Agreement to construct public parking facilities having an estimated cost in excess of $5,000,000, to bear the cost of constructing such facilities in excess of $2,000,000.00, to reconvey or dedicate to the Agency or the City of Santa Rosa certain parts of such property for public parking purposes, and to make annual payments of $401,000 to the City of Santa Rosa. Defendants allege that the Land Disposition Agreement has been submitted to Defendant Secretary but has not been approved, or consented to, by Defendant Secretary.

Except as expressly alleged in Paragraph VII of this answer, Defendants deny each and every allegation contained in Paragraph VII of the complaint.

VIII

Defendants deny each and every allegation contained in Paragraph VIII. [7]

IX

(a) Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IX(a), IX(b), IX(c), IX(d), IX(e), IX(f), and IX(g) of the complaint.

(b) Defendants admit that there are now approximately 748,000 square feet of general merchandise space in the City of Santa Rosa and allege that the shopping center proposal of the Developer provides for the construction of approximately 356,000 square feet of general merchandise space. Defendants admit that the shopping center proposal provides for the construction of 347,000 square feet of retail space other than general merchandise space. Except as expressly admitted or alleged in Paragraph IX(b) of this answer, Defendants deny each and every allegation contained in Paragraph IX(h) of the complaint.

(c) Defendants allege that the shopping center proposal provides for the construction of 1,256 off-street parking stalls for public parking; that the Land Disposition Agreement provides the Developer will construct a parking structure having estimated cost in excess of $5,000,000.00 and a cost to the Agency not to exceed $2,000,000.00; that the Agency presently intends to defray the local share of total cost for the Project, including costs related to parking facilities, by the issuance of Agency bonds, which may be parking lease revenue bonds, tax allocation bonds, or a combination of both such bonds; that pursuant to Article XIII, Section 19 of the California Constitution, the California Community Redevelopment Law (Health and Safety Code Sections 36000 et seq.), and the redevelopment plan for the Project, the Agency is authorized to incur indebtedness and to have paid into a special fund of the Agency—established

to pay the principal and interest on loans, monies, advanced to, or indebtedness incurred by the Agency to finance or refinance the Project in whole or in [8] part—a portion of the property tax revenues collected on property within the Project area; and that the parking structure will be operated and maintained by the City of Santa Rosa consistent with the operation and maintenance of all other off-street parking facilities owned by the City in downtown Santa Rosa.

Except as expressly admitted or alleged in Paragraph IX(c) of this answer, Defendants deny each and every allegation contained in Paragraph IX(i) of the complaint.

(d) Defendants allege that the Land Disposition Agreement between the Agency and the Developer provides that the Agency will acquire, and sell to the Developer, certain property within the Project area not presently owned by the Agency and that the anticipated cost to the Agency of acquisition of land and improvements is $4,959,000, plus $332,100 for site clearance; that part of such property is within the area added to the Project area by the amendment to the redevelopment plan adopted by the City Council of the City of Santa Rosa on October 29, 1974; that the terms of the Land Disposition Agreement provide that the property for the shopping center site within the area added to the Project area by said amendment will be conveyed to the Developer for $1,000,000.00, or equivalent or greater consideration, at the option of the Agency.

Except as admitted or alleged in Paragraph IX(d) of this answer, Defendants deny each and every allegation contained in Paragraph IX(j) of the complaint.

X

Defendants deny that the implementation or performance of the Land Disposition Agreement will frustrate the plan-

ning or development of a regional retail center at the Rohnert Park site or injure the City of Rohnert Park. Defendants admit that on or about November 27, 1973, the Defendant Secretary approved the Agency's application for an amendment to the Loan and Grant [9] Contract. Except as admitted in Paragraph X of this answer, Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X of the complaint.

XI

(a) Defendants allege that the Defendant Secretary is presently in the process of preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds and that or or about November 1, 1974 the Agency received a capital grant progress payment in the amount of $773,982.00 and a relocation assistance payment in the amount of $335,965.00, such sums being monies allocated to the Agency by amendments to the Loan and Grant Contract previously approved by the Defendant Secretary.

(b) Defendants admit that on or about September 24, 1974, the Agency and the City of Santa Rosa filed an action in the Superior Court of the State of California for the County of Sonoma against the City of Rohnert Park. Defendants deny that the purpose of said action was to permanently enjoin development at the Rohnert Park site, deny that the pleadings on file in said action disclose that the Agency and the City of Santa Rosa claim the sole and exclusive right to develop a regional shopping center in the County of Sonoma or claim that the errosion of the said alleged right would result in an irreparable injury to them; deny that the action is without merit or was brought to

deter the Plaintiff from authorizing and implementing the development of the Rohnert Park site in accordance with its general plan.

Defendants allege that the purpose of said action by the Agency and the City of Santa Rosa was to determine the adequacy, under California law, of an Environmental Impact Report prepared in connection with a zoning change for property located at [10] the Rohnert Park site, and, if such Environmental Impact Report was determined by the Court to be inadequate, to enjoin a zoning change with respect to said property until an adequate Environmental Impact Report had been prepared. Defendants allege that the pleadings and papers on file with the Court in such action disclose that the Association of Bay Area Governments concluded a regional shopping center should not be developed at the Rohnert Park site because of adverse consequences to the environment of the area.

(c) Defendants deny that the cost of litigating such suit on behalf of the Agency and the City of Santa Rosa is, or was, defrayed with funds obtained by the City of Santa Rosa or the Agency from the Defendant Secretary.

Except as expressly admitted, denied, and alleged in Paragraph XI of this answer, Defendants deny each and every allegation contained in Paragraph XI of the complaint.

XII

Defendants deny each and every allegation contained in Paragraph XII.

FIRST DEFENSE

The complaint fails to state a claim against Defendants, or any of them, upon which relief can be granted.

SECOND DEFENSE

The complaint fails to allege a beneficial or legal interest which would give Plaintiff standing to sue, or entitle Plaintiff to bring suit against Defendants, or any of them, under the Sherman Act, the Clayton Act, the Housing Act of 1949, the Administrative Procedure Act, or any other statute, with respect to the conduct and activities referred to in the complaint.

THIRD DEFENSE

Plaintiff has known since at least as early as September, 1970, the Defendant Agency would receive federal funds to defray [11] the costs of redevelopment with the area added to the Project area by the amendment to the redevelopment plan adopted by the City Council on March 10, 1970, and since at least as early as August, 1973, that the Agency and the Developer intended to enter into the Land Disposition Agreement and of the terms and provisions of such agreement. Plaintiff failed during the periods of time from the dates mentioned to the time of filing of this suit to seek a judicial determination of the validity of Defendants' acts and of plaintiff's legal rights. During such periods Defendants, with the knowledge of plaintiff and with the belief in good faith of the propriety of their actions, spent substantial funds to accomplish the redevelopment of the Project area and those acts necessary to allow performance of the Land Disposition Agreement. Therefore, plaintiff is barred by laches from claiming that the acts of Defendants, or any of them, under the circumstances are wrongful or in violation of any of the laws referred to in the complaint.

FOURTH DEFENSE

The alleged controversies referred to in the complaint are hypothetical, moot, or political and are not justiciable controversies under 28 U.S.C. 2201.

FIFTH DEFENSE

Plaintiff should be denied the injunctive relief prayed for because such injunctive relief will cause irreparable harm to Defendants.

SIXTH DEFENSE

On or about September 3, 1974, Plaintiff purported to make a zoning change, initiated upon the application of Codding Enterprises and Hugh Codding, of a portion of the property located at the Rohnert Park site. By such zoning change Codding Enterprises and Hugh Codding sought to carry out plans to develop land owned by Codding Enterprises as a regional shopping center to be owned [12] and operated by Codding Enterprises. Codding Enterprises and Hugh Codding are the developers and owners or part owners of all regional shopping center facilities in the County of Sonoma and such interests constitute a monopoly of regional shopping center facilities in the said county. The development of the Rohnert Park site as a regional shopping center would meet, and fill, the demand for such facilities in Sonoma County for the next twenty years and would inhibit and discourage potential developers of regional shopping center facilities, which would compete with the regional shopping center facilities developed and owned by Codding Enterprises and Hugh Codding, from developing such facilities at the shopping center site located within the Project area or at any other location within

Sonoma County. Under the circumstances, the shopping center proposal of Defendant Developer, the Land Disposition Agreement, and the actions and conduct of the Defendants referred to in the complaint will promote, and not restrain, competition in trade and commerce.

WHEREFORE, Defendants pray;

1. (a) That Plaintiff take nothing by its complaint herein, that Plaintiff be denied the relief prayed for in the complaint, or any other relief, and that this action be dismissed or in the alternative, if the Court determines that an adjudication of rights and obligations herein is proper;

   (b) That the Court enter judgment:

   (1) Declaring that the sale of land to Defendant Developer by Defendant Agency is not a conveyance for less than fair market value of the land for its highest and best uses permitted under the redevelopment plan and is not illegal or in violation of 42 U.S.C. 1460(c)(4) or Section 33433, Health and [13] Safety Code;

   (2) Declaring that Defendant Secretary will not be acting illegally or in excess of his authority if he approves the agreement between Defendant Agency and Defendant Developer for disposition of said land to the latter;

   (3) Declaring that the issuance by Defendant Agency of tax allocation bonds to finance redevelopment costs and indebtedness incurred by the Defendant Agency in connection with the Project will not cause damage

or harm to the various taxing agencies of the County of Sonoma or to Plaintiff City;

(4) Declaring that Defendant Secretary has acted legally and within his authority in approving payments of public funds to Defendant Agency without completing an environmental impact statement pursuant to the provisions of the National Environmental Policy Act and that Defendant Secretary may continue to approve such payments of public funds to the Defendant Agency without preparing such environmental impact statement;

(5) Declaring that Defendant Secretary has acted legally and within his authority in approving payments of public funds to the Defendant Agency without ascertaining that action and conduct of Defendant Agency and Defendant City complies with the laws of the State of California and that Defendant Secretary may continue to approve such payments of public funds to the Defendant Agency without ascer- [14] taining that actions and conduct of the Defendant Agency and Defendant City comply with the laws of the State of California;

(6) Declaring that the agreement between Defendant Agency and Defendant Developer, if carried out, will not be, or represent, a conspiracy or combination of interstate commerce or commerce in Sonoma County;

(7) Declaring that the Agreement between Defendant Agency and Defendant Developer, if carried out, will not be, or represent, an attempt to monopolize, or a combination or conspiracy to monopolize, interstate trade or commerce in Sonoma County, or any part thereof.

(8) Declaring that neither Plaintiff City, nor its inhabitants, merchants, property owners, or taxpayers, has suffered loss or damage or is threatened with loss or damage, in any sum or amount, by reason of any acts or conduct of the Defendants referred to in the complaint;

(9) Declaring that Plaintiff City is not entitled to sue for, or have, injunctive or any other form of relief by reason of any acts or conduct of Defendants referred to in the complaint; and

(10) Declaring that Defendants have not violated, and are not threatening to violate, the antitrust laws, the Housing Act of 1949, the California Community Redevelopment Law, the National Environmental Protection Act, or the Administrative Procedure Act;

2. That Defendants be awarded all costs sustained by them [15] in defending this action, including without limitation, reasonable attorneys' fees;

3. That Defendants be granted such other relief as the Court deems proper.

Dated: January 20, 1975.

JOSEPH E. COOMES, JR.
RICHARD E. BRANDT

By JOSEPH E. COOMES, JR.
Attorneys for Defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa

Appendix E(1)

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Attorneys for Defendant, Ernest W. Hahn, Inc.

United States District Court
Northern District of California

CIVIL ACTION NO.
C 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
v.
James T. Lynn, etc., et al.,
Defendants.

MOTION AND NOTICE OF MOTION FOR SUMMARY JUDGMENT, AFFIDAVIT OF JOHN M. GILCHRIST, JR. AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant ERNEST W. HAHN, INC., hereby moves the Court that it enter, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, a summary judgment in favor of said Defendant, on the ground that there is no genuine issue of material fact, and that Defendant ERNEST W. HAHN, INC. is entitled to judgment as a matter of law.

This motion is based on the affidavit of JOHN M. GILCHRIST, JR., and the Memorandum of Points and Authorities, both of which are attached hereto, and on the files and records of this proceeding.

Dated: August 11, 1976.

BARRET, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens [1]

NOTICE OF MOTION

TO PLAINTIFF, CITY OF ROHNERT PARK, AND TO COTTON, SELIGMAN & RAY, ITS ATTORNEYS:

PLEASE TAKE NOTICE, that on September 10, 1976, at 9:30 o'clock AM, or as soon thereafter as counsel can be heard, in Court Room No. 5, United States Courthouse, Federal Building, 450 Golden Gate Avenue, San Francisco, California, the undersigned will bring the above Motion on for hearing.

Dated: August 11, 1976.

BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens [2]

Appendix E(2)

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Attorneys for Defendant, Ernest W. Hahn, Inc.

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Defendants.

AFFIDAVIT OF JOHN M. GILCHRIST, JR. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

JOHN M. GILCHRIST, JR. being first duly sworn, deposes and says:

1. Affiant is vice president in charge of development pre-planning of Defendant ERNEST W. HAHN, INC., a

California corporation ("HAHN"). Affiant is familiar with the operations of HAHN pertaining to the acquisition, development, construction, operation, and management of regional and other shopping centers, including those centers presently in operation, those centers in the process of development or construction, and those centers which are only in the planning stage.

2. HAHN is in the process of developing a downtown commercial shopping center as an integral part of a federally [1] sponsored urban renewal project in Santa Rosa, California, to be known as "Santa Rosa Plaza" ("PROJECT").

3. At the present time, HAHN does not have an interest, as developer, owner, manager, or otherwise, in any regional or other type of shopping center or in any retail outlet in the County of Sonoma, other than the PROJECT. Nor does HAHN have any plans for the acquisition, development, construction, operation, or management of any shopping center or retail oulet in Sonoma County, other than the PROJECT.

4. The closest shopping center owned, operated, or managed by HAHN to the City of Rohnert Park is a regional shopping center in San Jose, California, known as Oakridge Mall. The next closest shopping center owned, operated, or managed by HAHN is a regional center in Redding, California, known as Mt. Shasta Mall. The closest shopping center in the planning stage to Rohnert Park is located in Corte Madera, California, approximately 40 miles from Rohnert Park.

5. By Ordinance No. 1036, dated December 5, 1961, Defendant City of Santa Rosa ("CITY") adopted a redevelopment plan for the PROJECT to be implemented by Defendant Urban Renewal Agency of the City of Santa

Rosa ("AGENCY"), a public body corporate and politic, organized and existing by virtue of Resolution No. 552 of the City Council of Defendant CITY dated March 27, 1958. (Since 1971, the AGENCY has considered the development of a downtown shopping center as an integral part of the project, and on or about March 27, 1972, entered into an agreement with Defendant HAHN whereby the AGENCY agreed to negotiate with no other developer for a period specified in the agreement, and thereafter extended from time to time, with respect to the development of such a shopping center.

6. Following extensive planning, design, and economic analysis, discussion and negotiations, HAHN submitted a proposal for the development of approximately 30 acres within the project as a [2] commercial shopping center. (On or about October 29, 1974, the CITY duly adopted and approved an amendment to the redevelopment plan which enlarged the project area to include a portion of the shopping center site not previously within the project area. On that date the AGENCY approved a land Disposition and Development Agreement ("AGREEMENT") between the AGENCY and HAHN.

7. That HAHN is presently engaged in the construction of downtown shopping centers in Redevelopment projects in Santa Maria, California, and Hawthorne, California. That in addition to the PROJECT, HAHN has plans for downtown shopping centers in Redevelopment projects located in Santa Monica, California, Pasadena, California, Sunnyvale, California, Long Beach, California, San Diego, California, Sommerville, New Jersey, and Ogden, Utah.

8. That the agreement between HAHN and the AGENCY pertaining to the PROJECT provides for no greater benefits to HAHN than those which HAHN has received

or contemplates receiving pursuant to similar Disposition and Development Agreements with the Urban Renewal Agencies in all of the other Redevelopment projects referred to in Paragraph 7 hereof.

9. HAHN entered into the Agreement with the AGENCY and, thereafter, attempted to develop the project pursuant to such agreement without any intent to set prices or exclude competition in the shopping center business in Sonoma County, California, or elsewhere.

10. The statements made herein are true of my own personal knowledge and if called as a witness I can competently testify thereto.

JOHN M. GILCHRIST, JR.
John M. Gilchrist, Jr.

Subscribed and sworn to before me
this 10th day of August 1976.

BARBARA L. EVANS
Notary Public

Official Seal
BARBARA L. EVANS
Notary Public California
Principal Office in
Los Angeles County
My Commission Expires Jan. 13, 1978 [3]

Appendix E(3)

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ERNEST W. HAHN, INC's MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page Number

I. Preliminary Statement 1
II. Since Economic Consequences Brought About By Governmental Action Cannot Give Rise to Liability Under The Sherman Act, The Agreement Between Hahn and The Agency Does Not Violate The Sherman Act 3
III. Plaintiff Lacks Standing To Assert Anti-Trust Claims Against Defendant Hahn 4
A. Plaintiff cannot show an injury to "business or property." 4
B. Even if Plaintiff suffered injury to "business or property" it lacks standing because any injury would not be within the "target area." 5
C. Plaintiff cannot maintain an action as parens patriae 6
IV. Conclusion ..... 7[i]

TABLE OF CASES

	Page
Conference of Studio Unions vs. Lowe's, Inc. (1951) 193 F.2nd 51, 54-55; cert. denied 342 U.S. 919, 96 L.Ed. 687	6
Gibson & Perin Co. vs. Cinncinatti (1973) 480 Fed.2nd 936	3
Hawaii vs. Standard Oil Co. (1972) 405 U.S. 251, 31 L.Ed.2nd 184	4
Hecht vs. Pro Football, Inc. (1971) 444, Fed.2nd 931, 939	3
Martin vs. Phillips Petroleum Company (1966) 365 F.2nd 629, 365 F.2nd 633	5
In Re Multi-District Vehicle Air Pollution M.D.L. No. 31 et al vs. Automobile Manufacturers Association, Inc., et al (1973) 481 F2nd 122, 131	5, 6, 7
Parker vs. Brown (1904), 195 U.S. 332, 49 L.Ed. 224	3
E. W. Wiggans Airway, Inc. vs. Mass. Port Authority (1970) 362 Fed.2nd 52	3

STATUTES

Clayton Act (15 U.S.C. § 15 and § 26)	4, 6
Sherman Act (15 U.S.C. 1 and 2	2[ii]

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ERNEST W. HAHN, INC's MOTION FOR SUMMARY JUDGMENT

I

PRELIMINARY STATEMENT

Defendant ERNEST W. HAHN, INC'S ("HAHN") Motion for Summary Judgment is being filed and set for

hearing concurrently with Motions for Summary Judgment by all other defendants in this action. Defendant HAHN hereby refers to all other defendants' Motions for Summary Judgment, and the supporting Affidavits and Memoranda of Points and Authorities, and by reference makes the same a part hereof.

Examination of the vague and unspecific contents of the Complaint reveals that the only charging allegations concerning Defendant HAHN consists of allegations of an agreement between [1] HAHN and Defendant Urban Renewal Agency of the City of Santa Rosa ("AGENCY") for the development and construction by HAHN of a downtown commercial shopping center as an integral part of a federally sponsored urban renewal project in Santa Rosa, California, to be known as "Santa Rosa Plaza ("PROJECT"). This agreement is not specifically described but apparently is the Disposition and Development Agreement which is the basic agreement in urban renewal projects between the agency and the developer. This agreement, it is alleged, unduly restrains trade and commerce in violation of the Sherman Act (15 U.S.C. 1 and 2). It would appear that no other violation of law, or other actionable conduct, is alleged to have been committed by HAHN.

What standing Plaintiff, City of Rohnert Park, a municipal corporation, has to maintain this action against HAHN is not set forth with any degree of specificity. There is a general allegation that "Plaintiff CITY, its inhabitants, taxpayers, and property owners have been injured in their business and property, ..." (Page 2, line 10 et seq of the Complaint) and an equally general and vague allegation that certain real property in the City of Rohnert Park was designated in the Master Plan as a site for the development of a regional shopping center, and that "some of the

real property so designated is and was at all times herein material owned by Plaintiff CITY." (Page 3, line 27 et seq) However, there is no allegation of what "business and property" of Plaintiff CITY has been injured or of what real property was owned by Plaintiff CITY or its nature and/or use.

This Memorandum will attempt to show that Defendant HAHN has not committed any violation of the Sherman Act and that, assuming *arguendo,* it had, Plaintiff CITY has no standing to maintain an action based thereon. [2]

II

SINCE ECONOMIC CONSEQUENCES BROUGHT ABOUT BY GOVERNMENTAL ACTION CANNOT GIVE RISE TO LIABILITY UNDER THE SHERMAN ACT, THE AGREEMENT BETWEEN HAHN AND THE AGENCY DOES NOT VIOLATE THE SHERMAN ACT

A principle established by numerous judicial decisions is that the functions performed by a governmental agency, and functions performed by private parties under the direction of a governmental agency which the governmental agency could have performed itself as a public function, are exempt from application of the anti-trust laws. *Parker vs. Brown* (1904), 195 U.S. 332, 49 L.Ed. 224; *E. W. Wiggins Airway, Inc. vs. Mass. Port Authority* (1970) 362 Fed. 2nd 52; *Hecht vs. Pro Football, Inc.* (1971) 444, Fed. 2nd 931, 939.

The case of *Gibson & Perin Co. vs. Cincinnati* (1973) 480 Fed. 2nd 936 is strikingly similar to the instant case. There, plaintiffs alleged that they were the victims of discrimination in the form of a competitive advantage to private parties resulting from the Redevelopment program in Cin-

cinnati. They objected that the design and construction of a Redevelopment parking facility made that facility particularly beneficial to a merchant within the Redevelopment project and placed plaintiffs, who were located outside the project, at a competitive disadvantage. The Complaint alleged, *inter alia,* violation of federal and state anti-trust laws.

The trial court ruled partially in favor of plaintiffs. The United States Court of Appeal, Sixth Circuit, reversed that judgment and remanded the case to the trial court with instructions to dismiss the complaint. The Court of Appeal rejected the plaintiffs' claims under the Sherman Act with the concise and unambiguous comment: "Participation in an Urban Redevelopment Project does not violate the anti-trust laws." *Gibson & Perin Co.,* [3] *supra,* at p. 946.

III

PLAINTIFF LACKS STANDING TO ASSERT ANTI-TRUST CLAIMS AGAINST DEFENDANT HAHN

A. *Plaintiff cannot show an injury to "business or property."* The words "business or property," as used in Section 4 of the Clayton Act (15 U.S.C. § 15), which authorizes the recovery of treble damages for injury to a "person's business or property" by reason of violations of the federal anti-trust laws, refer to commercial interests or enterprises. *Hawaii vs. Standard Oil Co.* (1972) 405 U.S. 251, 31 L.Ed. 2nd 184.

In Hawaii vs. Standard Oil Co., *supra,* the State of Hawaii asserted various anti-trust claims against the defendants in connection with the defendants' sale, marketing, and distribution of refined petroleum products. One of the counts of the Complaint alleged that the State brought

the action as *parens patriae* and was entitled to recover treble damages for injury to the State's economy and prosperity. Such injury allegedly included the wrongful extraction from the State of its citizens' revenues; increased taxes to offset such losses of such revenues; curtailment of manufacturing, shipping, and commerce; and competitive disadvantages to Hawaiian goods in the national market. The District Court denied the defendants' Motion to Dismiss, but the Court of Appeals for the Ninth Circuit reversed and directed the count to be dismissed on the ground that injury to the State's general economy was not an injury to "business or property."

In the instant case, Plaintiff CITY has not alleged and cannot prove any injury to "business or property" since it neither alleges nor has the proprietary commercial interest which can be adversely affected by the purported violations of Defendants. The conclusory allegation that "Plaintiff CITY, its inhabitants, taxpayers, and property owners have been injured in their business [4] and property . . ." is insufficient to establish either "injury" or the existence of "business or property" capable of being injured.

Similarly, the allegation that some of the real property designated as a site for the development of commercial facilities including a regional shopping center was owned by Plaintiff CITY, is insufficient to constitute "business or property." In *Martin vs. Phillips Petroleum Company* (1966) 365 F.2nd 629 a summary judgment for defendants was affirmed on appeal. The Court of Appeals held that where Plaintiff sought treble damages on the basis of asserted combination of defendants to restrain or monopolize interstate commerce by taking over and replacing Plaintiff in the acquisition of a gas plant, but plaintiff had had no experience in the operation of a gas plant, did

not have ability to finance business and made no investment in facilities or equipment, plaintiff was not injured in his business. The Court stated that while one need not have an actual going business to obtain standing ". . . there must be the intention to enter the business; . . . there must be a showing of preparedness to enter the business . . . ." 365 F.2nd 633.

B. *Even if Plaintiff suffered injury to "business or property" it lacks standing because any injury would not be within the "target area."*

In *In Re Multi-District Vehicle Air Pollution M.D.L. No. 31 et al vs. Automobile Manufacturers Association, Inc. et al* (1973) 481 F.2nd 122, an appeal was taken from denial, by the District Court, of Motions to Dismiss actions under the Clayton Act where it was alleged that Automobile Manufacturers conspired to eliminate all competition in research and development of motor vehicle air pollution equipment and in the purchase of patents and patent rights covering such equipment. The Ninth Circuit Court of Appeals held that where neither the Government's individual claims or its class claims nor its *parens patriae* claims alleged any [5] injury to commercial ventures or enterprises, the governmental entities had no standing to seek recovery under the treble damages section of the Clayton Act, and although farmers who alleged diminished crop yield by reason of the anti-trust violation satisfied the requirement of injury to "business or property," they likewise had no standing to seek treble damages because the injuries complained of were not within the "target area."

In *In Re Multi-District, supra,* the Court quotes from another Ninth Circuit case, *Conference of Studio Unions vs. Lowe's, Inc.* (1951) 193 F.2nd 51, 54-55; cert. denied 342 U.S. 919, 96 L.Ed. 687 as follows:

> "[T]o state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

In the instant case, even if Plaintiff CITY had injury to "business or property" such injury would be indirect and collateral and would not be to a commercial enterprise of plaintiff in the area of the economy in which the elimination of competition occurred. The target area for any violation by HAHN of the anti-trust laws would be the shopping center business, a business in which Plaintiff has never been an active participant. "Standing is denied . . . if the claimant's commercial activity occurred outside that area of the economy." *In Re Multi-District, supra,* page 126.

C. *Plaintiff cannot maintain an action as parens patriae.*

Any attempt by Plaintiff CITY to represent "its inhabitants, taxpayers, and property owners" must fail since a city cannot sue as *parens patriae,* even for injunctive relief based on Section 16 of the Clayton Act (15 U.S.C. Section 26). [6] As stated in *In Re Multi-District, supra,* at page 131:

> "... the Federal Government and the States, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances, sue as *parens patriae* to vindicate interests of their citizens ... (Citations omitted). On the other hand, political subdivisions such as cities and counties, whose power is derivitive and not sovereign, cannot sue as *parens patriae,* ..."

IV

CONCLUSION

For the foregoing reasons, Defendant ERNEST W. HAHN, INC. is entitled to summary judgment in its favor.

Dated August 11, 1976.

Respectfully submitted,

BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
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United States District Court
Northern District of California

CIVIL ACTION NO.
C 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant ERNEST W. HAHN, INC's Motion for Summary Judgment having come on regularly to be heard this day, and it appearing that Notice of Motion was given to Plaintiff pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, and it appearing that there is no genuine issue as to material fact, and that Defendant ERNEST W. HAHN, INC. is entitled to judgment as a matter of law; therefore,

IT IS ORDERED that Defendant ERNEST W. HAHN, INC's Motion for Summary Judgment be, and the same is, hereby granted.

Dated ....., 1976.

.....

Judge, U.S. District Court [1]

Appendix F(1)

Original Filed
Aug 20 1976

Clerk, U.S. Dist. Court
San Francisco

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In the United States District Court
for the Northern District of California

CIVIL NO. C-74-2429-RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANT SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

TO PLAINTIFF and to WILLIAM M. BRINTON AND RICARDO J. HECHT, its attorneys:

PLEASE TAKE NOTICE that on September 24, 1976, at 9:30 a.m., or as soon thereafter as counsel may be heard,

in Courtroom No. 5, of the above entitled court located at 450 Golden Gate Avenue, San Francisco, California, defendant, Secretary of the United States Department of Housing and Urban Development, will move the Court for an order dismissing the complaint and entering summary judgment in favor of defendant and against plaintiff.

This motion is made under Federal Rule of Civil Procedure 56(b) on the ground that the action raises no genuine issue as to any material fact and the defendant Secretary is entitled to judgment [1] as a matter of law and the ground that the Court lacks subject matter jurisdiction.

This motion is based on this notice, the pleadings, records, and files herein, on the affidavits of Julian A. Fitzhugh and Leevérn Johnson and the memorandum of points and authorities filed in support of this motion, and on the proposed summary judgment filed herewith.

Dated: August 20, 1976

JAMES L. BROWNING, JR.
United States Attorney

By: PAUL E. LOCKE
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Appendix F(2)

Original Filed
Aug 20 1976

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for the Northern District of California

CIVIL NO. C-74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	Statement of Facts Not in Dispute	2
III.	Issues	5
IV.	Argument	6
	A. Plaintiff has failed to state a cause of action upon which relief can be granted in that the plaintiff does not have standing and therefore no case or controversy exists	6
	1. Plaintiff has no standing under NEPA	6
	2. Plaintiff does not have standing to challenge an Urban Renewal Plan	7
	B. The Court lacks subject matter jurisdiction over the antitrust counts of plaintiff's Complaint	9
	C. Is the Federal defendant, Secretary of HUD, in violation of the Environmental Policy Act of 1969?	11
	D. Under the facts alleged in the Complaint should the Court enjoin the Federal defendant, Secretary of HUD, from taking any action which could cause damage to plaintiff by reason of any violation of the antitrust laws of the United States—15 U.S.C. § 1, 2?	12
	E. Has HUD acted arbitrarily in concurring in the minimum disposition price of $2 Million for 21 acres of land in Phase II of the project?	13
Conclusion		15

#1719

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United States District Court for the Northern District of California

CIVIL NO. C-74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I INTRODUCTION

This is an action instituted by the City of Rohnert Park against the Secretary of the United States Department of Housing and Urban Development, the City of Santa Rosa, its Urban Renewal Agency and Ernest W. Hahn, Inc. The suit seeks injunctive and declaratory relief in connection with the Santa Rosa Center project, a federally assisted

Urban Renewal Project in the City of Santa Rosa, California. Specifically, plaintiff demands to enjoin the Secretary of HUD from approving a certain land disposition agreement which has been entered into between defendants Santa Rosa's Urban Renewal Agency and Ernest W. Hahn, Inc., which agreement contemplates the construction and development of a regional shopping center in the City of Santa Rosa. Federal funds, by way of loan and grant [1] contract, will be involved for part of the proposed regional shopping center. Plaintiff bases its prayer for injunctive relief on the following grounds:

1. The Secretary has not prepared an Environmental Impact Statement (EIS) for the regional shopping center pursuant to NEPA 42 U.S.C. § 4321 *et seq.*

2. The Secretary is acting in violation of the antitrust laws of the United States. 15 U.S.C. § 1, 2.

3. The Secretary is acting in violation of the Housing Act of 1949 as amended, particularly 42 U.S.C. 1460(c)(4) and HUD's Urban Renewal Handbook 7214.1 Rev. Ch. 1. p. 1., Ch. 3, p. 9, as well as in violation of the California Health and Safety Code § 33433.

II STATEMENT OF FACTS NOT IN DISPUTE

The Federal defendant submits the following facts are not in dispute:

A. Plaintiff in municipal corporation existing under the laws of the State of California located approximately seven (7) miles south of the City of Santa Rosa (see Complaint, paragraph IV(a).)

B. The Santa Rosa Center Project is a federally-assisted Urban Renewal project in the City of Santa Rosa. The Santa Rosa Urban Renewal Plan was adopted by the City Council of Santa Rosa on December 5, 1961, and approved

by the Housing and Home Finance Agency (HHFA), predecessor of HUD on January 15, 1962. HHFA approved the first amendment to the Plan on January 14, 1964. HUD approved the third amendment to the Plan on May 25, 1970. This amendment was adopted by the Santa Rosa Redevelopment Agency on March 3, 1970 and adopted by the City Council of Santa Rosa on March 10, 1970.

The purpose of the third amendment to the Urban Renewal Plan was to increase the project area by 31.2 acres. This activity was [2] commenced as a result of damage caused by an earthquake which occurred in October 1969. Renewal treatment of the added area was undertaken to protect the adjacent area which had already been renewed from the spread of blight as a result of damage and deterioration caused by the earthquake.

HHFA had allocated $171,049.00 to the Santa Rosa Redevelopment Agency to undertake planning activities in the downtown area of Santa Rosa. This allocation order was amended March 6, 1962 to increase the amount to $190,898.00 for the purpose of completing the redevelopment plan and a loan and grant application. On March 9, 1962, HHFA received Part I of the Loan and Grant application from the Santa Rosa Redevelopment Agency the purpose of which was to carry out urban renewal activities in the Santa Rosa Center Project Area under Title I of the Housing Act of 1949. On June 6, 1962 the Loan and Grant Contract was executed which authorized the commencement of project activities in the 39.9 acres of downtown Santa Rosa. The contract provided for a Federal loan in the amount of $4,922,616.00 and a Federal Project Grant of $2,625,023.00.

This contract has been amended nine times on the following dates for the following reasons:

1st Amendatory to the Loan and Grant Contract executed June 18, 1963 increased the total grant to $2,694,263.00 and the total loan to $4,957,945.00.

2nd Amendatory to the Loan and Grant Contract executed February 7, 1964 increased the total grant to $3,184,594.00 and the total loan to $5,450,497.00.

3rd Amendatory to the Loan and Grant Contract executed October 18, 1963 decreased the total grant to $3,161,108.00 and increased the total loan amount to $5,778,721.00.

4th Amendatory to the Loan and Grant Contract executed May 10, 1967, increased total Federal Grant to $3,333,329.00 and the loan to $5,908,880.00.

5th Amendatory to the Loan and Grant Contract executed [3] June 9, 1970, did not change the loan or grant amount but did change allowable interest rate under the contract terms.

6th Amendatory to the Loan and Grant Contract executed September 14, 1970, increased the total grant to $8,318,497.00 and increased the project temporary loan to $13,223,939.00. The purpose of this amendment was to provide for redevelopment of an additional 31.2 acres.

7th Amendatory to the Loan and Grant Contract executed September 20, 1972, increased the total grant by $1,553,370.00 for a total grant of $10,436,717.00 and increased the project temporary loan by $1,533,370.00 for a total loan of $14,757,309.00. This amendment provided for increased costs of project activities but did not increase the project area.

8th Amendatory to the Loan and Grant Contract executed November 27, 1973, increased the total grant by $1,800,000.00 for a total grant of $12,236,717.00 and increased the project temporary loan by $1,800,000.00 for a total of $16,557,309.00. The purpose of the amendment was to provide for increased cost of project activities and did not provide for an increase in the project area.

9th Amendatory to the Loan and Grant Contract executed August 2, 1974, increased the total grant to $12,527,017.00 and increased the project temporary loan to $16,847,609.00. This amendment was to provide for increased cost of the project activities and did not provide for an increase in the project area. (See Affidavit of Julian A. Fitzhugh.)

C. That on July 22, 1975, HUD issued its Final Environmental Impact Statement for the Santa Rosa Center Project (California R-45). (See affidavit of Julian A. Fitzhugh.)

D. That on or about November 14, 1974, defendant Santa Rosa Urban Renewal Agency, pursuant to the Loan and Grant application approved on July 10, 1970, requested HUD to concur in the minimum disposition price on Phase II parcels of approximately 21 acres, [4] and to approve the land disposition agreement to be executed by defendant Hahn and defendant Santa Rosa Urban Renewal Agency. (See Affidavit of Julian A. Fitzhugh.)

E. That on or about November 7, 1975, after a review of the appraisals pertaining to the aforesaid 21 acres of land, HUD concurred that the minimum disposition price for the Phase II land to be devoted to a regional shopping center should not be less than Two Million Dollars ($2,000,000.00). HUD further interposed no objection to the execution of the land disposition agreement referred to in D above. (See affidavits of Leevern Johnson and Julian A. Fitzhugh.)

III ISSUES

The issues presented in this litigation are:

A. Does plaintiff, a municipal entity located approximately seven miles away from the Santa Rosa Center Project have standing to bring this action?

B. Whether or not the Court has jurisdiction of the subject matter insofar as it relates to plaintiff's allegations that the defendants are acting in violation of the Sherman Anti-Trust Act 15 U.S.C. § 1 *et seq.*?

C. Is the Federal defendant in volation of the National Environmental Policy Act of 1969. 42 U.S.C. § 4321, *et seq.*?

D. Under the facts alleged in the Complaint, should the Court enjoin the Federal defendant, Secretary of HUD, from taking any action which could cause damage to plaintiff by reason of any violation of the antitrust laws of the United States—15 U.S.C. § 1, 2?

E. Has HUD acted arbitrarily in concurring in the minimum disposition price of $2 Million for 21 acres of land in Phase II of the project?[5]

IV ARGUMENT

A. *Plaintiff has failed to state a cause of action upon which relief can be granted in that the plaintiff does not have standing and therefore no case or controversy exists.*

Plaintiff has failed to establish sufficient facts to give it standing to raise the issues found by the complaint. As heretofore stated, plaintiff is a municipality of the State of California located approximately 7 miles from Santa Rosa. Furthermore, plaintiff alleges that it, its inhabitants, taxpayers and property owners have been injured in their business and property (Complaint paragraph II). The test to determine this threshhold question is well established. The test requires that plaintiff meets two criteria:

1. Has plaintiff suffered "injury in fact"; and
2. Is plaintiff's interest arguably within the zone of interests to be protected or regulated by statute or constitutional provision.

See: *United States v. SCRAP* 412 U.S. 669, 686 (1973): *Sierra Club v. Morton* 405 U.S. 723, 733 (1972): *Association of Data Processing Services Organizations, Inc. v. Camp* 397 U.S. 150, 152-153 (1970); *Gibson & Perin Co. v. City of Cincinnati* 480 F.2d 936 (C.A. 6, 1973) *cert. den.* 414 U.S. 1068; *Community Hospital Corp. v. Southern Maryland Medical Center* 374 F. Supp. 450 (D. Med., 1974) affirmed 516 F.2d 1037 (C.A. 4, 1975) *cert. den.* 422 U.S. 1048

1. *Plaintiff has no standing under NEPA.*

No where in plaintiff's complaint is it alleged nor can any inference be shown therefrom that plaintiff is even remotely interested in the environment. On the contrary, plaintiff has, in essence, alleged that it will be financially injured by competition in the event that 21 acres of Phase II land is devoted to and developed into a regional shopping center. [6]

The purpose of NEPA was well enunciated in *Pizitz, Inc. v. Volpe* 2 ELR 20373 affirmed 467 F.2d (C.A. 5, 1972) wherein the Court held that NEPA is to impose upon Governmental agencies an awareness of the environment; it "was not designed to prevent loss of profits." In *Zlotnich v. District of Columbia Redevelopment Land Agency* 2 ELR 20235 (D. D.C., 1972) affirmed *per cur.* 494 F.2d 1152 (C.A. D.C. 1974) the Court dismissed an injunctive action for lack of standing where plaintiffs' motivation was to protect their own financial interests. There the Court stated:

> "To have standing grounded on a federal statute plaintiffs must assert an interest 'arguably' within the zone of interests to be protected or regulated by the statute . . . in question.' *Association of Data Processing Serv. Organizations, Inc. v. Camp* 397 U.S. 150, 153 (1970);

Blackhawk Heating & Plumbing Co. v. Driver, U.S. App. D.C., 433 F. 2d 1137, 1140 (1970). Plaintiffs can at best claim only a remote, insubstantial, highly speculative and ephemeral interest in the environment. They have nothing but their own financial interest to protect as their continuing efforts to achieve financial settlement."

And in *Community Hospital Corp. v. Southern Medical Center, supra.*, in holding that the plaintiff had no standing under NEPA said:

"Plaintiff first asserts standing as a competitor to SMMC. Despite all the references to the environment, it is apparent that plaintiff's real aim is not to improve the quality of life for this and future generations, but rather to prevent the building of a competitive hospital by highlighting the disadvantages of the competitor's site near an existing air base. While showing a real injury, this status is not within the area protected or regulated by NEPA."

In view of the above, plaintiff, whose concern is purely financial, has no standing to challenge the Federal defendant's actions pertaining to NEPA. Nor does plaintiff—although not alleged in the Complaint—have standing to challenge the adequacy of the EIS. (as noted above and discussed hereafter the Federal defendant has prepared a final EIS for the Santa Rosa Center project.

2. *Plaintiff does not have standing to challenge an Urban Renewal Plan.*

In *Gibson and Perin Co. v. City of Cincinnati*, 480 F.2d 932, *cert. den.*, 414 U.S. 1068 (1974) (6th Cir., 1973), a case which [7] closely parallels this case on its facts, a redevelopment scheme in Urban Cincinnati was held not to violate anti-trust laws. Although the Secretary and Regional Director of the Department of HUD were originally defendants, later voluntarily dismissed by plaintiffs, the claims of the plaintiffs correspond to those of Rohnert Park, to wit, conspiracy, fraud, violation of State and Federal civil rights and anti-trust laws, ". . . and with everything else they could think of including the charge of depriving them of due process of law and the equal protection of the law. They asked for injunctive relief and damages." at 939

The plaintiffs in *Gibson, supra*, were owners of property *outside* the area covered by the plan, much like Rohnert Park is, although they were merely across the street, as opposed to seven miles away.

The Court immediately found that the plaintiffs lacked standing to challenge the project.

"No cases have been cited to us by the Court or by the parties, nor have we found any cases, where persons located outside the Urban Renewal area have been permitted to question the design or location of buildings approved by the agency (the City, in the present case) as being in conformity with the Plan, said agency having been authorized by Congress to act." *Gibson* at 941

Then the Court stated no standing was conferred by the economic injury resultant from the redevelopment plan, under the Administrative Procedure Act.

"The Act [*sic*, APA] does not confer standing to seek judicial review upon anyone who suffers economic injury as a result of agency action, regardless of whether that person's private rights have been invaded. *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir., 1970); *Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency*, 310 F.2d 99 (7th Cir., 1962) *Id.*

As to the plaintiffs' claims of having standing under their status as taxpayers, the Court dismissed this claim by distinguishing *Data Processing Service v. Camp,* 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), by stating: [8]

> "Both cases involved persons within the zone of interests protected which is not true in the present case as plantiff(s) businesses were located outside the urban renewal area. Since they had no money invested in the structures located within the urban renewal area, they had no personal interest or stake in the project." at 942

To close their discussion of plaintiffs' standing, the Court stated that the plaintiffs must establish that they have a legal interest to maintain the suit, that they had not any, and:

> "Whatever damages plaintiffs sustained as a result of the urban renewal project are *damnum absque injuria.*" at 945

As to the allegations of anti-trust violations, the Court summarily disposed of this claim.

> "Participation in an urban renewal project does not violate the anti-trust laws. The anti-trust claims are frivolous." at 946

The fact that plaintiff city claims that because of the decision to build in Santa Rosa, there will not be a building of a similar shopping center in Rohnert Park, does not state a basis upon which relief can be granted. The resultant "freeze" on development in Rohnert Park is certainly a speculative claim, as well as a failure of plaintiff to allege any facts upon which this is based. Speculative claims do not meet the judicial requirement of standing. See *Simon v. Eastern Kentucky Welfare Rights Organization et al., etc.* ..... U.S. ..... United States Law Week (June 1, 1976) 44 LW 4724, 4729-30.

The foregoing discussion and case law clearly establishes the plaintiff has no standing to bring this action or any part thereof.

B. *The Court lacks subject matter jurisdiction over the antitrust counts of plaintiff's Complaint.*

A thorough review of plaintiffs' Complaint fails to reveal any allegation that the defendants herein are acting to restrain trade or commerce among the several states, (interstate commerce) or with foreign nations. Other than the naked allegation of the [9] above (paragraph VII(d) of the Complaint), plaintiff in paragraph IXa of the Complaint alleges that a substantial part of all merchandise sold in retail outlets in Sonoma County is imported into Sonoma County from states other than California and from foreign countries; however, the gravamen of the Complaint is found in paragraph XII wherein plaintiff restricts its allegations of antitrust violations to only Sonoma County and to this end alleges that it will be deprived of retail tax revenues (paragraph IV(d) of Complaint). The facts in instant case are analogous to those in *Sapp v. Jacobs* 408 F. Supp. 119 (S.D. Ill., 1976). That case also involved an alleged violation of the antitrust laws, 15 U.S.C. § 1, *et. seq.*, in connection with the construction of Regional shopping center. There, in holding that subject matter jurisdiction was absent on the antitrust claims the Court at page 131 said:

> "Again, assuming the same premises and scope of the Act, and accepting the estimates of more than $50,000,000 anticipated retail sales volume, and of more than 50% of such merchandise reaching the ultimate retailers through interstate commerce, and assuming

that the consuming public would be expected to be in some manner touched by those operative facts, plaintiffs' assertion of a jurisdictional base becomes wholly nebulous. In this regard, they espouse a position which is deemed to be a patent misconstruction of Section 4 of the Clayton Act. 15 U.S.C. § 15.

and at page 132:

"The court has, nevertheless, herein considered plaintiffs' position based upon the relationship of interstate commerce to the eventual retail activity at White Oaks. Even so, this complaint when fleshed out for all asserted theories, with all asserted facts admitted, does not set forth any basis for federal antitrust jurisdiction." [10]

"In summary, the asserted facts when uncontested require the conclusions that plaintiffs' activities in the premises were not "in" interstate commerce, and that any effect of the defendants' acts upon interstate commerce is too tenuous and remote to invoke the court's jurisdiction. It has been aptly observed that most localized activity does have some remote effect upon interstate commerce, but that some "'de minimis' factor must intervene or federal regulation is boundless." *Rasmussen v. American Dairy Association,* 472 F.2d 517, 526 (9th Cir., 1972), *cert. denied,* 412 U.S. 950, 93 S. Ct. 3014, 37 L.Ed. 2c 1003.

We submit that interstate commerce is not invoked in the instant case and therefore in view of *Sapp, supra,* and the cases cited therein it is clear that the Court lacks subject matter jurisdiction over the antitrust counts of the complaint and should therefore be dismissed.

However, assuming but without conceding the plaintiff does have the requisite standing, and subject matter jurisdiction exists, we will illustrate below that plaintiff is not entitled to any relief in this case.

C. *Is the Federal defendant, Secretary of HUD, in violation of the Environmental Policy Act of 1969?*

As set forth in the affidavit of Julian A. Fitzhugh, HUD has prepared a Final Environmental Impact Statement for the Santa Rosa Center Project. We therefore submit that the court must conclude that HUD is and has acted in compliance with NEPA. The court's attention is invited to Memorandum dated March 29, 1976, of the United States Court of Appeals for the Ninth Circuit in the case of *Codding Enterprises v. James T. Lynn et al.,* No. 74-3048 wherein the Court dismissed an appeal on the instant project as moot because HUD had prepared an environmental statement for the Santa Rosa project. A copy of the aforesaid Memorandum is attached for ease of reference. [11]

D. *Under the facts alleged in the Complaint should the Court enjoin the Federal defendant, Secretary of HUD, from taking any action which could cause damage to plaintiff by reason of any violation of the antitrust laws of the United States—15 U.S.C. § 1, 2?*

No where in the Complaint do we find any specific allegation that the Federal defendant is acting to restrain interstate trade or commerce. Plaintiff merely alleges (paragraph VII of Complaint) that an agreement between the municipal defendants and defendant Hahn entered into an agreement with knowledge and consent of the defendant Secretary. In this connection it is to be noted that HUD was not nor is a party to any agreement between defendants Santa Rosa and Hahn. HUD's administrative role in any redevelopment project which pertains to a land disposition agreement as herein involved is merely to review the document to insure that it meets with HUD require-

ments. (See affidavit of Julian A. Fitzhugh. Moreover, in the recent case of Alphin v. Henson, 392 F. Supp. 813, 826 (D. Md., 1975), in discussing Governmental immunity from the antitrust laws the Court, at page 826 stated:

> "It has been held that the antitrust laws are aimed at private action, not at Governmental action; that states, cities and Governmental agencies cannot be held liable for violations of the antitrust laws; and that restraints of trade which arise from *valid Governmental action* cannot give rise to private antitrust liability. (emphasis added.) [*Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943); *Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52 (1 Cir., 1966); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F. 2d 25 (1 Cir. 1970); *Ladue Local Lines, Inc. v. Bi-State Development Agency,* 433 F.2d 131 (8 Cir., 1970); *Padgett v. Louisville and Jefferson County Air Board,* 492 F. 2d 1258 (6 Cir., 1974); and cases cited in those opinions.]

See also *State of New Mexico v. American Petrofina Inc.,* 501 F.2d 363 (C.A. 9, 1974).

There can be no question that any urban renewal project, even it if includes a shopping center is a "valid governmental action." [12] In *Berman v. Parker,* 348 U.S. 26 (1954) at p. 34, 35 the Court held:

> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. Cf. *Gohld Realty Co. v. Hartford,* 141 Conn. 135, 141-144, 104 A. 2d 365, 368-370; *Hunter v. Redevelopment Authority,* 195 Va. 326, 338, 339, 78 S. E. 2d 893, 900-901. Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power."

In the instant case the inclusion to the renewal project of the additional 31.2 acres including 21 acres for a shopping center was necessitated by the blighted and deteriorated conditions resulting from an earthquake in Santa Rosa. Such a catastrophic situation does in fact give rise to valid governmental action. Certainly HUD participation in this project does not give rise to any violation of the antitrust laws. As stated in *Gibson, supra,* page 944, "Participation in an urban renewal project does not violate the antitrust laws."

Accordingly, we submit that plaintiff is not entitled to injunctive relief based upon the alleged violation of the antitrust laws. More simply stated, plaintiff's allegations do not rise to the dignity of any antitrust violations.

E. *Has HUD acted arbitrarily in concurring in the minimum disposition price of $2 Million for 21 acres of land in Phase II of the project?*

Title 42 U.S.C. § 1460(c)(4) provides that disposition of any property acquired in an urban renewal area be disposed of at its fair value for uses in accordance with the renewal plan. In this case it is contemplated that the defendant renewal agency will sell to defendant Hahn 21 acres of land in Phase II of the project for a price not less than $2 Million. The land involved will be used as a part of a shopping center. Under HUD regulations, the [13] renewal agency is required to obtain appraisals to determine the fair value of the land to be disposed. (see attached, paragraph 22 and 23 of Chapter 3 of HUD's Urban Renewal Handbook.) As evidenced by the Affidavit of Leevern John-

son the defendant agency did obtain appraisals of the 21-acre area of Phase II land and the appraisals were reviewed by competent real estate appraiser David L. Lane. M.A.I. of Sacramento. Mr. Lane also appraised the 21 acres. His appraisal as well as others were reviewed by Mr. Leevern Johnson in order to assure that HUD appraisal requirements had been met. Based upon a field review of the 21 acres and the comparable sales relied upon by the appraiser HUD concurred in the disposition price of not less than $2 Million. (The actual appraisals were less than $2 Million.)

HUD's responsibility in connection with a land disposition agreement and concurrence in its price are set forth in the affidavit of Julian A. Fitzhugh. In essence it performs a function of the Executive Branch of the Government in order to insure that Federal requirements are met. In this instance HUD assured itself that proper appraisal methods were used in arriving at the fair value of the land. The competency and qualifications of the appraisers retained by the defendant renewal agency are not disputed. In addition, HUD, although not a party, reviewed the disposition agreement between the renewal agency and Hahn to insure that it met HUD requirements.

It is clear that HUD has properly performed its review functions to protect the Government's interests. Further, the actions and determinations of HUD could not be called arbitrary; on the contrary they are purely within its discretionary powers. In this connection and under the circumstances involved herein we submit that the Court should not substitute its judgment for that of the defendant Secretary. See *Berman v. Parker, supra. Louisiana v. McAdoo,* 243 U.S. 627, 633 (1914) *Rural Electrification* [14] *Administration v. Northern States Power Company,* 373 F.2d 686, 700 (C.A. 8, 1967).

CONCLUSIONS

For the foregoing reasons plaintiff's Complaint should be dismissed or summary judgment should be entered in favor of the Federal defendant.

DATED: August 20, 1976.

Respectfully submitted,

JAMES L. BROWNING, JR.
United States Attorney

By: PAUL E. LOCKE
Paul E. Locke
Assistant United States Attorney

Attorneys for Federal Defendants [15]

URBAN RENEWAL HANDBOOK
7214.1 REV
LAND MARKETING AND REDEVELOPMENT
Chapter 3

CHAPTER 3. DETERMINATION OF DISPOSAL PRICE

22. *Minimum Disposal Price.* Unless sold for low or moderate income housing at the Section 107 valuation, or dedicated, as authorized for certain public purposes, urban renewal land shall be disposed of at a price not less than its fair reuse value. The fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land uses to be imposed on the redeveloper by the Urban Renewal Plan.

23. *Number of Appraisals.* Except as described in subparagraphs a, b and c below, each disposal parcel must be appraised independently by at least one competent professional appraiser in private practice. If the fair reuse value of a parcel exceeds $25,000, or if the Agency believes more than one appraisal is desirable, it shall obtain two appraisals of the parcel. If two or more appraisals are obtained, one may be performed by a competent staff appraiser of the Agency. The provisions of this paragraph assume that all Agency appraisals will be reviewed (see paragraph 33) by a fully qualified real property appraiser.

a. If the parcel to be appraised is a fragment of vacant land not separately buildable in accordance with the Urban Renewal Plan, one appraisal by a qualified appraiser in private practice or on the staff of the Agency is sufficient.

b. HUD shall, upon request from the Agency, determine the fair reuse value of property to be sold for low or moderate income housing under the Section 107 valuation (see paragraph 24 below). There will be no fee charged to the urban renewal project for such HUD appraisal.

c. If the parcel is fully (100%) eligible as a project improvement and dedicated in accordance with paragraph 29 below, it need not be appraised.

24. *Section 107 Appraisal of Sites for Low or Moderate Income Housing.* As described in paragraph 23b above, HUD will determine the value of property to be sold for low or moderate income housing under the provisions of Section 107 of the Housing Act of 1949, as amended.

a. *Definition of Section 107 Valuation.* The Section 107 valuation is the maximum price that would be paid for the property by a well-informed, prudently acting buyer, who is motivated solely by the objective of meeting the housing needs of low or moderate income families or individuals rather than by profit or gain, and who is not controlled or directed or influenced in his decisions, by persons or firms seeking to derive profit or gain from the undertaking. [9]

FILED

Mar 29 1976

Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

No. 74-3048

Codding Enterprises,
Plaintiff-Appellant,

vs.

James T. Lynn, Secretary, Department
of Housing and Urban Development;
Robert H. Baida; James H. Price;
Julian Fitzhugh, et al.,
Defendants-Appellants.

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and WALLACE, Circuit Judges,
and EAST,* District Judge

Codding Enterprises brought this action to enjoin the Department of Housing and Urban Development from financing the construction of a large shopping center in Santa Rosa, California, until an environmental impact statement is filed as required by 42 U.S.C. § 4332(2)(c). The district court found that the plaintiff lacked standing

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

to enforce the National Environmental Policy Act and dismissed the action. Codding appealed. Since then, HUD has prepared and submitted the environmental statement.

The appeal is moot. The judgment appealed from is vacated and the case is remanded with directions to dismiss the action as moot.

Appendix G(1)

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United States District Court
Northern District of California

NO. C74-2429 RHS

City of Rohnert Park, a municipal corporation,

Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants.

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANTS CITY OF SANTA ROSA AND THE URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

TO PLAINTIFF AND TO WILLIAM M. BRINTON AND RICARDO J. HECHT, ITS ATTORNEYS:

PLEASE TAKE NOTICE that on September 24, 1976, at 9:30 a.m. or as soon thereafter as counsel may be heard, in Courtroom 5 of the above entitled court located at 450 Golden Gate Avenue, San Francisco, California, defendants City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa, will move the court for an order dismissing the complaint and entering summary judgment in favor of defendants and against plaintiff.

This motion is made under Federal Rule of Civil Procedure 56(b) on the ground that the action raises no genuine issue as to any material fact and the City of Santa Rosa and the Urban Renewal [1] Agency of the City of Santa Rosa are entitled to judgment as a matter of law and the ground that the court lacks subject matter jurisdiction.

This motion is based on this notice, the pleadings, records, and files herein, on the affidavits of James K. Burns, Richard E. Brandt and Joseph E. Coomes, Jr. and the memorandum of points and authorities filed in support of this motion, and on the proposed summary judgment filed herewith.

Dated: August 20, 1976.

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By RICHARD E. BRANDT
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United States District Court
Northern District of California

NO. C74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
vs.
James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc. a California corporation,
Defendants.

BRIEF OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [1]

TABLE OF CONTENTS

I. Statement of the Case
A. Summary of Facts

B. Summary of Arguments
II. Arguments
A. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims Purportedly Based On Alleged Violation Of The Sherman Act
B. The Court Is Barred From Exercising Jurisdiction Over Plaintiff's Claims Against The Santa Rosa Defendants Based On Alleged Sale Of Land For Inadequate Consideration And Alleged Restraint of Trade, Monopoly And Attempt to Monopolize Because To Do So Would Interfere With The In Rem Jurisdiction Of The Sonoma County Superior Court
C. The Court Is Barred From Entertaining Any Claim Against The Santa Rosa Defendants Based On State Law
D. Plaintiff's Allegation That The National Environmental Policy Act (NEPA) Has Been Violated By A Failure To Prepare An Environmental Impact Statement (EIS) Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants
1. An EIS Has Been Prepared For The Urban Renewal Project
2. Failure Of The Federal Defendants To Comply With NEPA Cannot Justify An Injunction Or Declaratory Relief Against The Santa Rosa Defendants
E. Plaintiff's Allegation That The Land Is Being Sold To Hahn For Less Than Adequate Consideration In Violation Of 42 U.S.C. 1460(c)(4), The Urban Renewal Handbook,

And Section 334.33, California Health and Safety Code Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants

1. Plaintiff Lacks Standing To Sue
2. The Santa Rosa Defendants Are Not Obligated By The Federal Regulation Or The State Or Federal Statutes
3. As A Matter Of Law, The Action Of The Santa Rosa Defendants Cannot Be Challenged For Alleged Inadequacy Of Consideration From Hahn Because The Finding Of The Urban Renewal Agency That The Consideration From Hahn Was Adequate Is Supported By Substantial Evidence Contained In The Record Of The Agency's Hearings On The Hahn Contract

F. Plaintiff's Allegation That The Hahn Contract, The Expenditure Of Public Funds For The Urban Renewal Project, And The Proposed Use Of Tax Allocation Financing Violate Sections 1 and 2 Of The Sherman Act Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants

1. Plaintiff Lacks Standing To Sue For Any Alleged Violation Of The Sherman Act
2. The Redevelopment Activities Of The Santa Rosa Defendants, Including The Expenditures Of Public Funds, The Use Of Tax Allocation Financing, And The Resale of Land For Commercial Reuse, Such As The Proposed Hahn Shopping Center, Are Sovereign Acts For A Public Purpose And For That Reason Are Immune From The Sherman Act
3. The Economic Consequences Of The Santa Rosa Defendants' Valid Governmental Action Cannot Give Rise To Liability Under The Sherman Act.

III. Conclusion

I. STATEMENT OF THE CASE

This action by the City of Rohnert Park against James T. Lynn, Secretary of the United States Department of Housing and Urban Development ("HUD"); the City of Santa Rosa, and the Urban Renewal Agency of the City of Santa Rosa (hereinafter sometimes collectivey referred to as "the Santa Rosa defendants"); and Ernest W. Hahn, Inc., ("Hahn") seeks to enjoin the defendants from spending public funds, approving or participating in the sale of land, or taking any other action to authorize or carry out the proposed construction of a regional shopping center as part of a Santa Rosa central business district urban renewal project. Approximately 20 acres of the 30-acre shopping center site are within an area of the project referred to as "Phase II," that has received federal assistance under a loan and grant contract between HUD and the Urban Renewal Agency (now known as the Housing and Redevelopment Agency and hereinafter referred to as "the Agency"). The shopping center is to be constructed by Hahn, in acordance with conditions established by a contract between Hahn and the Agency ("the Hahn Contract") conveying the land of the shopping center site. The Hahn contract has two complex alternatives, either of which may be elected by the Agency, solely at its own discretion. The contract requires, among other things, that Hahn pay the Agency $2 million for land in Phase II, bear a majority of the costs of constructing a multi-million dollar public parking facility, and subject its development of the property to review by the Agency for compliance with the contract.

The City of Rohnert Park claims that the Hahn contract violates the Housing Act of 1949 (42 USC 1460 [c] [4]), HUD regulations (Urban Renewal Handbook 7214.1 Rev. Ch. 1, p. 1, Ch. 3, p. 9), and the California Community Redevelopment Law (Health and Safety Code, Section 33433) as a sale of property for less than allegedly required by the statutes and regulations; that HUD is [2] violating the National Environmental Policy Act (42 USC, Sections 3431, et seq.) by failing to prepare an environmental impact statement ("EIS") for the federally assisted part of the project; and that the regional shopping center development, including the Hahn contract, the proposed use of the tax allocation method of financing the local public costs of redevelopment, and "subsidy" effect of past or proposed governmental actions, violate Sections 1 and 2 of the Sherman Act (15 USC 1 and 2).

This Motion for Summary Judgment and Motion to Dismiss of the Santa Rosa defendants is based, in part, on government and judicial actions which have occurred since this suit was filed in November of 1974. Because the pleadings do not fully describe the present status of the matters allegedly in dispute, the immediately following section of this brief summarizes the material facts, which are set forth and explained in further detail in the affidavits of James K. Burns, Richard E. Brandt and Joseph E. Coomes, Jr. submitted in support of the motions.

A. *Summary of Facts*

The original redevelopment plan for the Santa Rosa Center project was adopted by Santa Rosa City Council Ordinance No. 1036 on December 5, 1961. The original project area of approximately 40 acres is referred to as Phase I. After an earthquake in October of 1969 damaged prop-

erty in downtown Santa Rosa, the City Council, by Ordinance No. 1436, amended the redevelopment plan to add approximately 31 acres now referred to as Phase II.

During late 1972 and early 1973 Mr. Burns, the Executive Director of the Agency, investigated whether private developers might be interested in developing a shopping center in the portion of Phase II which at that time had not been committed to other purposes. In February of 1973, after confirming such interest, the Agency authorized placement of newspaper advertisements soliciting requests to participate in such development from [3] experienced regional shopping centers developers. After prospective developers were interviewed and screened, Hahn was tentatively selected, and the Agency authorized an agreement for a period of exclusive negotiations. Negotiations, including planning and feasibility studies, continued through two extensions of the original negotiating period and ultimately culminated in a predisposition agreement approved by the Agency on August 6, 1973. By this interim agreement, Hahn agreed to construct the shopping center on the condition, among others, that the redevelopment plan be amended to include the area now referred to as Phase III within the project.

In late 1973 and 1974 the Agency staff and its expert consultants conducted the detailed studies required by the California Community Redevelopment Law to insure that Phase III qualified for redevelopment. This process of evaluation was completed in a series of noticed public hearings in October of 1974. At hearings held on October 16 and October 29 the Agency considered, and certified as completed in compliance with the California Environmental Quality Act (CEQA), an environmental impact report (EIR) for the redevelopment project and shopping center.

On the latter date the Agency also conducted a noticed hearing at which it tentatively approved the Hahn contract, subject to HUD concurrence. On the same day the City Council, in joint session with the Agency, considered two amendments to the redevelopment plan. One amendment, which was adopted on that date as Ordinance No. 1741, added Phase III to the project. The other amendment provided for the closing of certain streets and alteration of traffic patterns in Phase II to accommodate the shopping center. Since Phase II received federal support through the loan and grant contract, the City Council deferred final action on the second amendment, pending concurrence by HUD.

On November 19, 1974, the City of Rohnert Park filed this [4] suit. Shortly thereafter a Validating Proceeding, the exclusive means of contesting a redevelopment project in the California courts, was instituted in the Sonoma County Superior Court against the redevelopment plan amendment adding Phase III to the project. The Validating Proceeding was filed by Codding Enterprises, the principal owner of the regional shopping center site in Rohnert Park which is the principal basis of plaintiff's asserted interest in this suit. By separate suit in the Sonoma County Superior Court Codding Enterprises challenged the validity and adequacy of the EIR prepared for the project.

After the filing of these suits, the Santa Rosa defendants were informed by HUD that it would not concur in the Hahn contract or in the redevelopment plan amendment for Phase II until an EIS had been completed. A draft EIS was circulated to interested parties for their comments in the late spring of 1975; the review process of the final EIS was completed in September. Thereafter, HUD concurred with the Phase II plan amendment, and on Novem-

ber 4, 1975, the City Council adopted the amended Phase II plan as Ordinance No. 1791.

At about the same time the EIS was completed, the Agency commissioned David Lane, M.A.I., to prepare an updated reuse appraisal (i.e., an appraisal assessing the value of land after it has been acquired and cleared by the Agency but subject to the restrictions of the redevelopment plan) for the property to be sold to Hahn. The Lane reuse appraisal confirmed, as did two previous reuse appraisals and a previous summary of appraisals by Mr. Lane himself, that the price to Hahn specified by the Hahn contract exceeded the fair market value of the shopping center site and its fair value for uses in accordance with the plan. All of these appraisals were submitted by the Agency to HUD which, after an independent examination and field review by its own real estate expert, Mr. Leevern Johnson, informed the Agency in early [5] November of its concurrence in the Hahn contract and the disposition price for Phase II land. At a noticed public hearing on December 1, 1975, the Agency considered the concurrence of HUD, the Lane appraisal, and the testimony of Mr. Lane and others, and gave its final approval to the Hahn Contract. Plaintiff was separately informed of the hearing date through counsel at the deposition of Mr. Johnson on November 11, 1975, but plaintiff did not appear or present evidence on the value of the site sold to Hahn, although more than a year had passed since it first alleged inadequate consideration from Hahn by the filing of this suit.

On or about December 31, 1975, Codding Enterprises filed a second in rem Validating Proceeding in the Sonoma County Superior Court to contest the Phase II plan amendment adopted by the City Council on November 4, 1975. The suit was later consolidated with the in rem Validating

Proceeding on the plan amendment adding Phase III, the suit against the project EIR referred to above, and a suit by Codding Enterprises challenging a City application to HUD for community development funds allocated to the City for fiscal year 1975 and an EIR for the application. The City proposed to use part of the funds for land acquisition and clearing and relocation costs in Phase III.

The four consolidated suits were tried in May of 1976 before the Honorable J. Hilary Cook, specially assigned to the Sonoma County Superior Court. On July 28, 1976, Judge Cook filed a Notice of Intended Decision (Exhibit E to Affidavit of Richard E. Brandt) indicating that he intended to find the redevelopment plan amendments and the Santa Rosa defendants' actions to develop the proposed shopping center valid and in compliance with applicable laws. As is hereafter explained, all issues purportedly raised by this suit, except those concerning the obligations of HUD under NEPA were litigated in the Superior Court proceeding which, as an in rem action, will be binding on plaintiff City of Rohnert Park [6] when it becomes final.

The lawsuits described above are but four of a dozen suits commenced since April of 1973 that have been either filed or financially supported by Codding Enterprises to contest the development of a regional shopping center in the redevelopment project. In each of the eight such lawsuits not described in this brief, Codding Enterprises or the party it financially supported has been denied all relief at the trial court level. One appellate decision has been rendered against Codding Enterprises, and three cases remain pending on appeal. Codding Enterprises is the owner of the only existing integrated regional shopping center in Sonoma County and the owner with Cofego Enterprises of the potential shopping center site in Rohnert

Park which plaintiff in this suit claims is the source of its interest and concern in the redevelopment activities of the Santa Rosa defendants. Codding Enterprises is also an owner of Cofego Enterprises. According to the testimony of Peter Callinan, City Manager of plaintiff, and Arthur Hollingsworth, past president of the Rohnert Park Chamber of Commerce, which is described in the Affidavit of Joseph E. Coomes, Jr., as of early May, 1975, Codding Enterprises and Cofego Enterprises had contributed all of the funds expanded by plaintiff for attorneys' fees in this suit.

The relevance to this suit of the Codding actions and the relationship between plaintiff City and Codding Enterprise, in addition to the prospective res judicata effect on Rohnert Park of the in rem proceeding instituted by Codding, is that the relationship and the lawsuits show an identity of interests between plaintiff and Codding Enterprises in that the injury plaintiff complains of in this case is derivative of the economic consequences of Santa Rosa redevelopment on the attempts of Codding Enterprises to develop a regional shopping center in Rohnert Park. This denouement of the matters in dispute assists the demonstration [7] that plaintiff's claims are without merit because it shows that the only difference between the plaintiff's position and that of the competitor such as Codding, allegedly disadvantaged by redevelopment is the plaintiff's position is more remote from the economic and other impacts of the defendants redevelopment and more hypothetical in imagining a legal injury. Numerous judicial decisions have found that the disadvantage competition has no suit against redevelopment based on the allegations of illegality here made by Rohnert Park. *A fortiori*, Rohnert Park, which claims to be indirectly injured by a supposed

direct injury to such disadvantaged competitors has no merit to its case.

B. *Summary of Arguments*

The Santa Rosa defendants submit that the court must dismiss this suit at to them and that they are entitled to Summary Judgment as a matter of law and plaintiff's claims raise no genuine issue of material fact. The suit should be dismissed because plaintiff lacks standing to sue for violation of NEPA, the Federal Housing Act of 1949, HUD regulations, the Health and Safety Code or the Sherman Act. Dismissal of plaintiff's Sherman Act claims is also required because the court lacks subject matter jurisdiction in that the activities complained of, as a matter of law, are not interstate commerce and do not affect interstate commerce. As to the Santa Rosa defendants, the court is barred from exercising jurisdiction over any claims of plaintiff purportedly founded on an alleged sale of land to Hahn for inadequate consideration, violation of anti-trust laws, or violation of state law, because these issues have previously been litigated in an in rem state court proceeding which will be binding on plaintiff and any exercise of jurisdiction by this court would wrongfully interfere with the state court's jurisdiction.

Apart from infirmities of lack of standing and lack of jurisdiction, the Santa Rosa defendants are entitled to judgment [8] as a matter of law because the claims of plaintiffs raise no genuine issue as to any material fact. There is no violation of NEPA because HUD has prepared an EIS. The federal statute and regulation and the state statute referred to by plaintiff impose no obligation of the Santa Rosa defendants with respect to the adequacy of

consideration from Hahn. In any event, the Santa Rosa defendant's action cannot be challenged on that ground because the administrative record of their proceedings on the Hahn contract establishes as a matter of law that their finding that the consideration was adequate is supported by substantial evidence. Finally, plaintiff's allegations of violation of the Sherman Act are without merit. The activities complained of are sovereign, governmental actions in accordance with the mandate of state law and for that reason are immune from application of the Sherman Act. The economic consequences of valid governmental action cannot give rise to liability under the Sherman Act.

II. ARGUMENTS

A. *The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims Purportedly Based On Alleged Violation Of The Sherman Act*

The court has subject matter jurisdiction over plaintiff's claim brought under the Clayton Act (15 USC 26) for violation of section 1 and 2 of the Sherman Act only if the activities alleged to violate these antitrust laws occur within the flow of interstate commerce, or if they occur locally and in intrastate commerce, but substantially affect interstate commerce. *Sapp v. Jacobs,* 408 F.Supp. 119 (1976) S.D.Ill. (1976). *Burke v. Ford* 389 U.S. 320, 321, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967); *Las Vegas Merchant Plumbers Assn. v. United States* 210 F.2d 732, 739 (9th Cir. 1954), cert den. 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645; *DeVoto v. Pacific Fidelity Life Insurance Company* 516 F.2d 1, 4 (9th Cir. 1975). The gravemen of plaintiff's antitrust claim is that the expenditures of the Santa Rosa defendants and the federal [9] government for the redevelopment project will give Hahn a competitive advantage over Codding Enterprises or whoever else may try to develop the potential shopping center site in Rohnert Park and discourage and inhibit Codding or other developer from building a shopping center at the Rohnert Park site because of the threat of competition from Hahn. Plaintiff views the purpose and effect of the Santa Rosa shopping center as follows: (Complaint, paragraph VIII)

> (a) To enhance and render impregnable the already dominant position which Defendant City and its merchants have in the retail merchandising industry in Sonoma County generally and more specifically in the Santa Rosa Trade Area:
>
> (b) To eliminate actual and potential competition from merchants located in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners;
>
> (c) To enhance Defendant City's already large share of retail sales tax dollars collected in Sonoma County and to increase the burden of property taxes in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners;
>
> (d) To unduly restrain the trade and commerce among the states and with foreign countries.

Almost identical claims were considered by the court in *Sapp v. Jacobs, supra,* and were found to not involve matters "in" interstate commerce or substantially affecting interstate commerce. The plaintiff in *Sapp* argued that the development of such a regional shopping center was in interstate commerce because tenants were solicited from out of state. Responding to that argument, the court stated:

> The premise must fail. Plaintiff's activities were geared to the development of real estate in Illinois

> for the purpose of providing a regional center, through the facilities of which persons other than themselves would engage in the intrastate retail sale of merchandise. That wholly local activity does not become an activity "in interstate commerce" simply by reason of the fact that they did solicit prospective tenants from other states.

The court then reviewed a litany of decisions holding that commercial real estate development was not a matter within the [10] purview of the Sherman Act, noting that only in *Goldfarb v. Virginia State Bar* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) had real estate transactions been found potentially subject to the Sherman Act and there only because of the interstate financing of the particular transactions involved. Rohnert Park has not alleged that development of the potential shopping center site in its jurisdiction involves interstate financing nor is there any evidence to support such a claim.

The court in *Sapp* also rejected the argument that the development of a regional shopping center had a substantial affect on interstate commerce, and in particular, refused to accept the assertion that retail activities of the future tenants of such a shopping center in interstate commerce justified application of the Sherman Act to the activities of the developing the shopping center. In the words of the Court:

> Plaintiffs' theory of jurisdiction, attaching by reasons of the anticipated substantial volume of retail sales which the ultimate development of White Oaks is anticipated to generate, is novel in two respects. First, it relies upon a prospective effect upon interstate commerce which will not occur until some unfixed time in the future. Secondly, in light of the fact that plaintiffs are not, within the context of complaint,

> engaged in retail merchandising, their assertion of their injury must be vicariously tied to an anticipated prospective effect which will fall upon persons other than themselves. No case is found which has sustained antitrust jurisdiction upon a like premise. *Sapp v. Jacobs,* 408 F.Supp. 119, 130 (1976).

The court also rejected the suggestion that usurpation or monopoly of the opportunity to develop gave rise to an action or claim. The court stated:

> It is obvious that the burden, if any, which would arise from the fact that White Oaks will be the only available shopping center, falls upon the consuming public and, possibly, upon retailers who are in the market for mall space in the market area. The restraint of such burden cannot descend as a vicarious mantle around the plaintiffs to convert a presumed injury to other persons into an injury to the plaintiffs in their use and enjoyment of real estate. Id. at 131.

Finally, the court concluded:

> In summary, the asserted facts when uncontested require the [11] conclusions that plaintiffs' activities in the premises were not "in" interstate commerce, and that any effect of the defendants' acts upon interstate commerce is too tenuous and remote to invoke the court's jurisdiction. It has been aptly observed that most localized activity does have some remote effect upon interstate commerce, but that some " 'de minimis' factor must intervene or federal regulation is boundless". Id. at 132.

That the incidental and remote relationship between a use or development of real estate and the flow of goods in interstate commerce does not justify application of the Sherman Act is also supported by numerous other cases. See *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d

742 (9th Cir. 1936), cert. den. 299 U.S. 613, 81 L.Ed. 452, 57 S.Ct. 315; *Monument Bowl, Inc. v. Northern California Bowling Proprietors Assn.,* 197 F.Supp. 208 (N.D. Cal. 1961), *Marston v. Ann Arbor Property Management Assn.* 302 F.Supp. 1276 (D.Mich. 1969); *St. Anthony—Minneapolis, Inc. v. Red Owl Stores* 316 F.Supp. 1045 (D. Minn. 1970).

The plaintiff admits that the relevant market is only a small part of California, Sonoma County and the Santa Rosa trade area. (Complaint, Par. VIII). The complaint itself shows the development activities at issue in this suit and the local tax revenue and other economic consequences alleged to flow from such activities, are uniquely local and intrastate in their effect and concern. Plaintiff's remedy, if any, for restraint of trade therefore must be under state antitrust law such as the Cartwright Act.

B. *The Court Is Barred From Exercising Jurisdiction Over Plaintiff's Claims Against The Santa Rosa Defendants Based On Alleged Sale Of Land For Inadequate Consideration And Alleged Restraint Of Trade, Monopoly And Attempt To Monopolize Because To Do So Would Interfere With The In Rem Jurisdiction Of The Sonoma County Superior Court.*

The California Community Redevelopment Law provides a remedy for any party, such as the city of Rohnert Park, which claims to be aggrieved by a redevelopment project. Section 33501 of the California Health and Safety Code states: [12]

> An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceedings theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, and the adoption of the redevelopment or renewal plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale and delivery of the bonds and for the payment of the principal thereof and interest thereon.

Chapter 9 of the Code of Civil Procedure (Sections 860-870) entitled "VALIDATING PROCEEDINGS" establish detailed procedures to resolve in a single lawsuit all complaints against, and challenges to the validity of, a redevelopment project. Section 860 states:

> A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. *The action shall be in the nature of a proceeding in rem.* (Emphasis added)

Section 863 provides that private parties may resort to the procedures of validating proceedings when a suit is not instituted by a public agency.

In *City of Ontario v. Superior Court,* 2 Cal.3d 335, 446 P.2d 693, 85 Cal.Rptr. 149 (1970) the California Supreme Court held that the provisions of Chapter 9, Title 10 of the Code of Civil Procedure, taken as a whole, required the con-

clusion that the validating proceedings is the exclusive means by which a plaintiff can contest a decision of a public agency concerning a redevelopment project. The Court explained:

> The public's opportunity to challenge those decisions, moreover, is commensurately restricted by this legislation. Section 863 of chapter 9 [13] provides that if the public agency does not initiate validating proceedings, 'any interested person may bring an action within the time and in the court specified by Section 860 of this chapter to determine the validity of such matter.' This seems innocuous enough, until one reads section 869: 'No contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified.
>
> In other words, while section 863 says that an interested person "may" bring such an action, section 869 says he must do so or be forever barred from contesting the validity of the agency's action in a court of law.
>
> (*City of Ontario v. Superior Court, supra,* p. 341).

The rule of *City of Ontario* that failure of an interested party to challenge a redevelopment project in a validating proceeding bars any attempt to contest a redevelopment project in a separate suit was reemphasized in *Plunkett v. City of Lakewood,* 44 Cal.App.3d 344, 116 Cal.Rptr. 885 (1975).

Validating proceedings were instituted in Sonoma County Superior Court against both the Phase III redevelopment plan amendment and the Phase II plan amendment. The allegations of Rohnert Park in this action that the consideration of the Hahn contract is inadequate and in violation of 42 USC 1460(c)(4), Urban Renewal Handbook 7214.1 Rev.,

Ch. 1, p. 1, and Health and Safety Code Section 33433 and that the Hahn contract, tax allocation financing, and other financial arrangements for development of the shopping center of the Santa Rosa project violated the antitrust law were litigated in the trial of the validating proceedings on May 17, 18, and 19, 1976. (See, First Amended Complaint, Exhibit A to Affidavit of Richard E. Brandt). On July 28, 1976, Judge J. Hilary Cook filed his Notice of Intended Decision indicating that he will rule in favor of the Santa Rosa defendants on the issues litigated and find the amendments to the redevelopment plan and the redevelopment activities of the Santa Rosa defendants to be valid public actions. (See, Exhibit E to Affidavit of Richard E. Brandt). Under California law a judgment [14] in an in rem proceeding, such as a validating proceeding, is res judicata and binding on all persons whether or not they were personally before the court. *Crall v. Poso* Irr. Dist. 87 Cal. 140, 26 P. 797 (1890); see also, 4 *Witkin,* Cal.Proc.2d, Judgment, Section 180, pp. 3321-3332, and Section 236, pp. 3369-3370.

Rohnert Park is now to be barred by the 60-day period of limitations for a validating proceeding from litigating in state court the claims made in this suit; when the judgment in the validating proceedings becomes final, Rohnert Park will also be barred from litigating its claims by the doctrines of res judicata and collateral estoppel. The bar of res judicata and collateral estoppel arising from a decision in the state court also bars an action in the federal courts, both on issues of state law and issue of federal law. See *Township of Hopewell v. Volpe,* 446 F.2d 167 (1971).

Although the decision of the validating proceedings is not yet final, this court is nonetheless barred from entertaining Rohnert Park claims against the Santa Rosa defendants because the state court proceeding was an in rem

action and Rohnert Park will be bound by the judgment. A collateral attack on the validity of the acts of the Santa Rosa defendants in this suit is barred the fundamental principle of federal jurisdiction that a federal court cannot entertain an in personam action, such as this suit by Rohnert Park, or grant declaratory or injunctive relief where to do so would create a conflict between a state in rem judgment and the federal judgment. Phrased in slightly different terms:

> The general rule that the jurisdiction of a court, state or federal, having in rem or quasi in rem control or disposition of specific property cannot be interfered with, and that this rule involves a principle of necessity and leaves nothing to discretion, applies as well to declaratory actions as to other proceedings.
>
> (*Moore's Federal Practice,* 2d Ed., Vol. 1A, Part 2, ¶ 0.220, p. 2605). [15]

The res before the Superior Court for Sonoma County, as defined by Health and Safety Code Section 33501 quoted above, consisted of all the redevelopment activities of the Santa Rosa defendants challenged in this suit. The purpose of the validating proceeding was to determine all claims involving the redevelopment project, to achieve the conclusive determination of legality essential to proceeding with financing and the complex transaction of a redevelopment project. By finding the amended redevelopment plan valid, the state court necessarily found that the proposed shopping center development could not be declared invalid or enjoined based on the alleged inadequacy of consideration from Hahn for the shopping center site or the antitrust claims made here by Rohnert Park. Insofar as this action seeks declaratory and injunctive relief against the Santa Rosa defendants it asks for a remedy which cannot

be granted without conflicting with the in rem jurisdiction of the state court and with the intended decision announced by the state court. The in rem nature of the state court's judgment requires that this court dismiss this suit against the Santa Rosa defendants. See *Burbridge Foundation, Inc. v. Reinholdt & Gardner,* 496 F 2d 326 (CA8 1974); *Moore's Federal Practice,* 2d.Ed., Vol. 1A, Part 2 ¶ 0.214, p. 2507, Note 25 and cases cited therein.

In *Gart v. Cole,* 263 F.2d 244 (2d Cir. 1959), cert. den. 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed. 2d 929, the court of appeal, on the basis of the full-faith-and-credit clause of the United States Constitution, refused to entertain claims involving the sale of property to a developer similar to the claims raised here by Rohnert Park. The court held that the plaintiffs-appellants were barred from relitigating issues of federal law in the District Court when barred from doing so in the state court by the state law regarding class actions. Their action was barred even though the plaintiffs-appellants had not themselves been parties to the [16] state court action. In reaching its decision, the court reasoned with reference to the earlier state:

> All [appellants] had ample notice of the suit; parties plaintiff there had no interests contrary to appellants in this action; and the same counsel prosecuted both suits. To the general rule that only persons subject to a court's jurisdiction are bound by its judgment, there has long been an exception for suits of a representative character.

The interests of Codding Enterprises in the validating proceeding were in complete consonance with those of Rohnert Park. Rohnert Park cannot deny knowledge of the pendency of the state court proceeding or that it had the opportunity to be a party. All of the reasons for respecting

the state class action rule in *Gart v. Cole* equally support respecting the in rem jurisdiction of the state court in this suit by dismissal of the action against the Santa Rosa defendants.

C. *The Court Is Barred From Entertaining Any Claim Against The Santa Rosa Defendants Based on State Law.*

Plaintiff's challenge to the adequacy of consideration from Hahn for the shopping center site is based in part on an alleged violation of Section 33433, Health and Safety Code. Although the complaint does not appear to directly allege any other violation of state law, plaintiff insinuates that the Santa Rosa defendants are acting without state law authority in proposing to use tax allocation financing and are permitting development inconsistent with the Santa Rosa General Plan.

On matters of state law the federal court must apply the decisions of state courts as its rules of decision. 28 U.S.C. 1652. This principal pertains to questions of state law before a federal district court on the basis of pendant jurisdiction, as Rohnert Park's state law claims are in this case. *Briskin v. Glickman,* 267 F.Supp. 600 (DC NY 1957). The federal courts are bound by state decisions which foreclose the maintenance of suit because of the bar of the statute of limitations or lack of [17] jurisdiction. *Guaranty Trust Co. v. York,* 326 US 99, 89 L.Ed. 2079, 65 S.Ct. 1464 reh den. 326 US 860, 90 L.Ed. 491, 66 S.Ct. 7.

The courts of the State of California have held that they have no jurisdiction to entertain a suit alleging invalidity of redevelopment activities except in accordance with the provisions on validating proceedings in the Code of Civil Procedure and that the 60-day period within which such

an action may be instituted is in the nature of a statute of limitations for all suits against a redevelopment project. *City of Ontario v. Superior Court, supra; Plunkett v. City of Lakewood, supra.* These decisions bar Rohnert Park from contesting the redevelopment activities of the Santa Rosa defendants based on state law in state courts. A federal court may enforce state law only when the state provides that a plaintiff has a right to do so. *Voutrey v. General Baking Co.,* 39 F.Supp. 974 (E.D. Penn. 1941). Rohnert Park cannot sue to enforce state law in this court because it is barred from doing so in the state court.

D. *Plaintiff's Allegation That The National Environmental Policy Act (NEPA) Has Been Violated By A Failure To Prepare An Environmental Impact Statement (EIS) Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants.*

1. *An EIS has been Prepared for the Urban Renewal Project.*

The affidavit of James K. Burns and the affidavits of the federal defendants establish that an EIS has been prepared by HUD for the Santa Rosa urban renewal project. Assuming for the sake of argument that HUD was required to prepare such an EIS, all issues concerning that obligation have now been rendered moot.

2. *Failure of the Federal Defendants to Comply with NEPA Cannot Justify an Injunction or Declaratory Relief Against the Santa Rosa Defendants.*

Even if the federal defendants had failed to comply with NEPA such failure cannot justify the enjoining of the Santa Rosa defendants or Hahn from proceeding with the shop-

ping center [18] development proposed for the project. NEPA is a federal statute that imposes an obligation upon the agencies of the federal government to prepare an EIS in specified circumstances. (42 USC 4332). The federal courts have repeatedly held that actions of state and local government agencies and private individuals cannot be enjoined or challenged for alleged violations of NEPA either by such local agencies or by federal agencies. *Ely v. Velde,* 451 F2d 1150 (CA4 VA 1971); *Bradford Township v. Illinois State Toll Highway Authority,* 463 F2d 537 (CA7 ILL. 1972) cert.den. 409 U.S. 1040, 34 L.ed.2d 499, 93 S.Ct. 518; *Northeast Area Welfare Rights Organization v. Volpe,* 2 ERC 1704 (DC WASH 1971); *Boston v. Volpe,* 464 F2d 254 (CA1 MASS. 1972); and *Miltenberg v. Chesapeake N.O. R.CO.,* 450 F2d 971 (CA4 MD 1971); *Proelta v. Dent,* 484 F.2d 1146 (CA2 NY 1973). State government defendants have been enjoined in connection with a federal agency's failure to comply with NEPA only when the acts of the state agency will irrevocably commit the federal agency to a project that is primarily federal in the sense that the project is financed principally by the federal funds and would not take place but for the "major federal action" that invokes the requirement for preparation of an EIS. *La Raza Unida v. Volpe,* 337 F.Supp. 221 (DC Cal. 1971) cert den. 409 U.S. 890, 34 L.Ed.2d 147, 93 S.Ct. 105.

The financing plans and arrangements described in the affidavit of James K. Burns and the attached Report to City Council irrefutably demonstrate that the proposed shopping center development is not such a federal project. The unexpended federal source funds budget of approximately $1.6 million is but a small part of the estimated $15,070,300.00 of remaining Phase II public costs, and it is dwarfed by the private costs of more than $40 million to be

borne by Hahn. Even this comparison over-emphasizes the federal involvement in the shopping center development. As Burns [19] states in his affidavits, of the budgeted uses of federal funds only the $400,000.00 allocated to street improvements has even a remote relation to the shopping center reuse of the project area, and even these improvements would probably be necessary for any other reuse. The Agency is not entitled to any additional federal funds under the loan and grant contract, and HUD has informed the Agency that no more funds will be furnished.

The Agency and the City are empowered by the state law and by the redevelopment plan to raise and spend funds for the public costs of the redevelopment and to carry out the project without any federal participation whatsoever. That, in effect, is what the Agency is doing for Phase III. Tax allocation bonds issued by the Agency under authority of state statute (Health and Safety Code, Sections 33760-33674) and the California Constitution (Article XVI, Section 16) have been proposed as a source of funds to pay the public costs of the areas redevelopment.

The present involvement of HUD in the Santa Rosa project consists of federal review to insure compliance with long-existing obligations of the loan and grant contract. The Ninth Circuit, in a case involving redevelopment in San Francisco, expressly refused to find that such residual federal involvement constitutes major federal action for purposes of NEPA. The court analysed such federal review as follows:

> Appellants argue that the June 26, 1970 and April 28, 1972 amendatory grants to the San Francisco Redevelopment Agency and HUD's contractual right to monitor the project as it develops to assure compliance with statutory and contractual requirements constituted major federal actions subsequent to the passage of NEPA. We hold otherwise.

[4] Amendatory contracts which increase the federal funding only to provide for the rising costs of land acquisition and relocation of displaced residents do not constitute "further major federal action" within the meaning of the Act. Instead, such amendments represent but confirmation of the Federal Government's earlier decision that the project proposal conformed to HUD requirements and was therefore eligible for a grant and loan. The major federal action was the execution of the initial grant and loan contract which occurred over four years before the effective [20] date of NEPA. Monitoring the project only assures HUD that the undertakings of SFRA under its contract of December 2, 1966 will be fulfilled and involves no further major federal action.

Appellant's strong reliance on highway cases in which courts have found major federal actions requiring environmental impact statements under NEPA is misplaced. *San Francisco Tommorow v. Romney,* 472 F.2d 1021, 1025 (1973).

Santa Rosa cannot be characterized as a "federal" project as that designation is used to identify those projects where actions of state agencies can be enjoined pending compliance with CEQA. Phase I and earlier development in Phase II may have involved major federal action but the future activities Rohnert Park now seeks to enjoin clearly are not. As in *City of Boston v. Volpe, supra,* federal involvement in past stages of the project, stages unrelated to the shopping center development at issue in this case, cannot justify the enjoining of what is now essentially a local government venture.

Finally, based on the allegations made by Rohnert Park in its complaint, it appears that plaintiff lacks standing to sue for violation of NEPA. The impacts and consequences of the activities complained of are clearly economic and fiscal in nature. Such concerns are not within the zone of interests protected by NEPA and cannot confer standing to institute suit based on the act. *Clinton Community Hospital Corp. v. Southern Maryland Medical Center,* 374 F.Supp. 450 (D.Md. 1974).

E. *Plaintiff's Allegation That The Land Is Being Sold to Hahn For Less Than Adequate Consideration In Violation of 42 U.S.C. 1460(c)(4), The Urban Renewal Handbook, And Section 33433, California Health And Safety Code Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants.*

1. *Plaintiff Lacks Standing to Sue.*

Rohnert Park does not claim to be a party to any contract or agreement concerning the redevelopment project, that it owns property within the project, that it has a business or other interest that will be relocated from the project area, or that it is a taxpayer of the City of Santa Rosa. Plaintiff merely [21] alleges that if a regional shopping center is constructed in the redevelopment project of Santa Rosa, it will discourage the development of a similar center at a location in Rohnert Park and cause attendant adverse economic consequences to plaintiff, such as loss of taxes, and that if the tax allocation financing authorized by state law is used to finance the public cost of redevelopment, the expected increase in property tax revenues from redevelopment will not immediately inure to benefit of plaintiff and other taxing entities in Sonoma County. The excerpt from the deposition of plaintiff's City Manager, Peter Callinan, shows that plaintiff's only proprietary interest in the Rohnert Park shopping center site is the ownership of a parcel held for future use as a library site.

The federal courts have consistently held that persons not parties to the loan and grant contract between the local agency and the federal government, and who are not property owners within the project entitled to specific benefits, such as relocation payments, granted by the Housing Act of 1949, have no judicially cognizable interest and no standing to sue for an alleged failure to comply with the Act. The United States Court of Appeals for the Sixth Circuit, in a case closely resembling this one, except that the plaintiff was not a government entity, affirmed this principle in a suit involving a redevelopment project of the City of Cincinnati. The court stated:

> The Act does not confer standing to seek judicial review upon anyone who suffers economic injury as a result of agency action, regardless of whether that person's private rights have been invaded. *Woodland Market Realty Co. v. City of Cleveland,* 426 F.2d 955 (6th Cir. 1970); *Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency,* 310 F.2d 99 (7th Cir. 1962). (*Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 941 [1973]).

The court rejected the argument that recent cases expanding the category of persons entitled to sue under other laws required a departure from past cases limiting standing purportedly based [22] on the Housing Act of 1949 to the parties to the loan and grant contract:

> In our case no review was provided by statute of acts of agencies and private developers of Urban Renewal projects. We think it was because review would frustrate implementation of Urban Renewal plans and would discourage cities and redevelopers who might not want to become embroiled in protracted litigation, particularly after they had expended their money to participate in the project.

> In our case, under no stretch of the imagination can it be claimed that plaintiffs, who were located outside the Urban Renewal area, were within the zone of interests protected by the statute. Since they had no money invested in the structures located in the Urban Renewal area, they had no personal interest or stake in the project. (*Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 936, 942 [1973]).

Recently, in *Warth v. Seldin* (422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 [1975]), the United States Supreme Court reached a conclusion consistent with that of the court in *Gibson & Perin Co.* and also rejected the suggestion that indirect economic consequences resulting from the local tax structure—such as the tax allocation impacts here complained of by Rohnert Park—invaded judicially cognizable interests. In *Warth v. Seldin* the Court refused to hold that zoning action of a suburban town that allegedly increased taxes in the adjacent city of Rochester gave taxpayers of Rochester standing to sue for asserted violation of their constitutional rights. The Court stated:

> The petitioners who assert standing on the basis of their status as taxpayers of the city of Rochester present a different set of problems. These "taxpayer-petitioners" claim that they are suffering economic injury consequent to Penfield's allegedly discriminatory and exclusionary zoning practices. Their argument, in brief, is that Penfield's persistent refusal to allow or to facilitate construction of low- and moderate-cost housing forces the city of Rochester to provide such housing in greater numbers than it otherwise would do; that to provide such housing, Rochester must allow certain tax abatements; and that as the amount of tax-abated property increases, Rochester taxpayers are forced to assume an increased tax burden in order to finance essential public services.

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP,* 412 US 669, 688, 37 L.Ed.2d 254, 93 S.Ct. 2405 (1973). We think the complaint of the taxpayer-petitioners is little more than such an exercise. Apart [23] from the conjectural nature of the asserted injury, the line of causation between Penfield's actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

But even if we assume that the taxpayer-petitioners could establish that Penfield's zoning practices harm them, their complaint nonetheless was properly dismissed. Petitioners do not, even if they could, assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester.

(*Warth v. Seldin,* 45 L.Ed.2d 343, 360-361).

The same considerations of the court in *Warth v. Seldin* dictate a determination that plaintiff lacks standing in this suit.

2. *The Santa Rosa Defendants Are Not Obligated by the Federal Regulation or the State or Federal Statutes.*

Regardless of plaintiff's entitlement to sue for alleged violation of 42 USC 1460(c)(4), the Urban Renewal Handbook, and Health and Safety Code, Section 33433, as a matter of law, plaintiff is not entitled to any remedy against the Santa Rosa defendants. Because the federal laws and regulations are mandates to the federal administration, not the local agency, the only possible remedy for violation of

the federal requirement is against the federal defendant. The state requirement does not apply to the Santa Rosa defendants because the property in question was not purchased from the proceeds of a redevelopment revolving fund.

Both state and federal courts have held that the proper method of enforcing judicially cognizable grievances arising from loan and grant contracts is by petition to the federal administrator and not by suit against the local Agency. In *Johnson v. Redevelopment Agency of the City of Oakland,* 317 F.2d 872 (9th Cir. 1963) plaintiff argued that the local agency could be sued directly because the loan and grant contract imposed essentially the same obligation on the agency with respect to relocation as that imposed on the federal agency by the Housing Act. The Ninth [24] Circuit Court of Appeals denied this proposition with the following words:

> We find no indication that Congress intended this section of the Housing Act to give a right of action to those not a party to the contract between the Redevelopment Agency and the United States. This provision is but one of many obligations imposed upon the Redevelopment Agency by the United States as a condition to the granting of redevelopment funds and loans. Because of the complexity of urban renewal and the expertise of the Adminstrator of the Federal Housing and Home Finance Agency, Congress delegated to the Administrator the duty of enforcing the conditions of the Loan and Capital Grant Contract required by the Housing Act. See *Hunter v. City of New York,* Sup., 121 N.Y.S.2d 841 (1953).

But, argues appellant, since the contract contained substantially the same requirements as Section 1455(c), they are third party beneficiaries under California law. This is not true because the contract, involving an

agency of the United States and controlled by federal statutes, is governed by federal law. *Johnson v. Redevelopment Agency of the City of Oakland,* 317 F.2d, 872, 874 (1963).

The California Supreme Court has also found that questions concerning a redevelopment agency's compliance with the requirements of the Housing Act of 1949 or a loan and grant contract are matters delegated solely to the federal agency and that a third party cannot sue a city or agency for allegedly illegally spending funds in violation of the federal law. *In re Redevelopment Plan for Bunker Hill* (61 Cal.2d 21, 75-76; 37 Cal. Rptr. 74, 389 P.2d 538 [1964]) the Court adopted the position of a New York court that:

> "If the city is improperly spending or contemplates spending funds contributed toward the project by the National Housing and Home Finance Agency, it is a matter for the consideration and concern of the federal administrator and not for the plaintiff and, on this feature, the court is of the view that the plaintiff is without legal capacity to sue." (See also *Gart v. Cole* (2d Cir. 1959) 263 F.2d 244, 250 [8], cert. den. 359 U.S. 978 [79 S.Ct. 898, 3 L.Ed.2d 929]; *Pittsburgh Hotels Assn., Inc. v. Urban Redevelopment Authority* (D.C. W.D. Penn. 1962) 202 F.Supp. 486, 492-493 [8], *Harrison-Halstead Community Group, Inc. v. Housing & Home Finance Agency* (7th Cir. 1962) 310 F.2d 99, 103-105 [2-5], in each of which cases it was held that the plaintiffs therein had no standing to litigate questions under the Housing Act of 1949, as amended.) *Shipley v. Smith* (1940) 45 N.M. 23 [107 P.2d 1050, 131 A.L.R. 1225], cited and relied upon by the Goldmans on this point, was an action to enjoin [25] payment of money from the county treasury and in no way dealt with the expenditure of federal funds by a state agency. *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d 21, 75-76 (1964).

The assertion that the Santa Rosa defendants have breached Health and Safety Code Section 33433 is also without merit as a matter of law. Section 33433 provides:

> No real or personal property, or any interest therein, acquired or constructed in whole or in part with money from the redevelopment revolving fund shall be sold or leased for an amount less than its fair value for uses in accordance with the redevelopment plan as determined by resolution or ordinance of the legislative body.

A redevelopment revolving fund as referred to in the statute is a special fund created by appropriation of the City in accordance with Section 33620 and 33621 of the Health and Safety Code. No such revolving fund has been established by the Santa Rosa defendants.

3. *As a Matter Of Law, The Action Of The Santa Rosa Defendants Cannot Be Challenged For Alleged Inadequacy Of Consideration From Hahn Because The Finding Of The Urban Renewal Agency That The Consideration From Hahn Was Adequate Is Supported By Substantial Evidence Contained In The Record Of The Agency's Hearings On The Hahn Contract.*

The Community Redevelopment Law charges the Agency with the responsibility for carrying out the redevelopment plan. (Health and Safety Code Section 33372). The Agency's exercise of its powers and discharge of its duties can be challenged only for abuse of discretion; action within the scope of its official responsibilities cannot be questioned in the courts if supported by substantial evidence before the Agency. *In re Bunker Hill, supra,* pp. 37-40; *Berggren v. Moore* 61 Cal.2d 347, 38 Cal.Rptr. 722, 392 P.2d 522 (1964). This rule of law applies to the Agency's decision that the Hahn contract is supported by adequate consideration.

Judge Cook has announced he intends to find that:

> The agency's finding that the Hahn contract was [26] fair and equitable for the land according to its value for reuse and was not less than its fair value for uses in accordance with the redevelopment plan is supported by substantial evidence contained in the record.

The record referred to by the Judge is the administrative record before the court in the validating proceeding, the same record that is attached to in the affidavit of Mr. James Burns, filed in support of these motions. That record shows not only that the Agency's finding as to the value of the shopping center site is supported by substantial evidence, as found by Judge Cook, but also that, as a matter of law, no other conclusion is permissible based on the evidence presented before the Agency. Mr. Burns' affidavit indicates that the Agency obtained several reuse appraisals on the property and all of them supported the conclusion that the consideration of the Hahn contract was adequate. The final appraisal by Mr. David E. Lane was presented to the Agency at its hearing on December 1, 1975, before it gave its final approval to the Hahn contract. No conflicting evidence was presented.

At the deposition of Mr. Leevern Johnson in this case, plaintiff's counsel were informed of the time and purpose of the noticed public hearing on the Hahn contract. Nonetheless, the record of that hearing shows they failed to appear or present evidence on the matter of the adequacy of consideration by Hahn. The attorney representing Codding Enterprises appeared and objected to the adequacy of consideration but presented no evidence. Rohnert Park cannot now question that evidence supporting the Agency's finding or challenge its veracity unless it was for some reason deprived of an opportunity to present evidence

before the Agency. The published notice of hearing, the personal notice to counsel for Rohnert Park, and the fact that more than one year elapsed betwen the time Rohnert Park filed this lawsuit charging inadequate consideration and the time the Agency considered the [27] matter at its hearing on the Hahn contract belie any argument that Rohnert Park should now be allowed to contest the adequacy of the Hahn consideration after it failed to do so before the Agency.

F. *Plaintiff's Allegation That The Hahn Contract, The Expenditure Of Public Funds For The Urban Renewal Project, And The Proposed Use Of Tax Allocation Financing Violate Sections 1 and 2 Of The Sherman Act Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants.*

1. *Plaintiff Lacks Standing To Sue For Any Alleged Violation Of The Sharmen Act.*

The City of Rohnert Park can sue under Section 4 of the Clayton Act (15 USC, Section 15) only if it can demonstrate injury to its business or property. The deposition of Peter Callinan, plaintiff's City Manager, which has previously been referred to, establishes that plaintiff's only property at the potential shopping center site in Rohnert Park is a single parcel designated for use as a library site. Plaintiff does not contend that it is engaged in retailing or real estate development; the only economic injury that it complains of is the fiscal impact on its tax revenues that will supposedly result from development of the Hahn shopping center in Santa Rosa. Plaintiff cannot found its entitlement to sue upon the alleged injury to its citizens and taxpayers; absent a direct injury to its property or business interest

Rohnert Park has no standing to sue, *Hawaii v. Standard Oil Co.* 405 US 251, 31 L.Ed.2d 184, 92 S.Ct. 885 (1972).

2. *The Redevelopment Activities Of The Santa Rosa Defendants, Including The Expenditures Of Public Funds, The Use Of Tax Allocation Financing, And The Resale Of Land For Commercial Reuse, Such As The Proposed Hahn Shopping Center, Are Sovereign Acts For A Public Purpose And For That Reason Are Immune From The Sherman Act.*

Rohnert Park complains that the Hahn contract and the proposed method of financing Santa Rosa project through tax allocation bonds violate the antitrust laws by subsidizing the shopping center development, thereby placing developers who wish to locate [28] in Rohnert Park at a competitive disadvantage and diverting to the City of Santa Rosa tax revenues that otherwise would be shared by Rohnert Park. Assuming for the sake of argument that the redevelopment activities of the Santa Rosa defendants directly effect Rohnert Park, they are, nonetheless, actions clearly immune from the antitrust laws both as acts done in a sovereign capacity and as acts directed by mandate of the state legislature through the Community Redevelopment Law.

State government and its subdivisions are immune from the federal antitrust laws with respect to acts in a sovereign capacity and acts done in accordance with the mandate of state law. *State of New Mexico v. American Petrofina, Inc.* 501 F 2d 363 (CA 9th Cir. 1974); *Goldfarb v. Virginia State Bar* 421 US 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975). The Santa Rosa defendants are immune for both reasons.

The Community Redevelopment Law declares:

> "The redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and *are governmental functions of state concern in the interest of health, safety and welfare of the people of the State* and of the communities in which the areas exist. (Health and Safety Code Section 33037[c])." (Emphasis added)

The procedures the Agency must follow in carrying out redevelopment are regulated in detail by the statute to accomplish the purposes of the state legislature. In *Fellom v. Redevelopment Agency,* 157 Cal.App.2d 243, 320 P 2d 884 (1958) the court explained the role of the local agency in rejecting the appellant's arguments that the redevelopment law was unconstitutional as legislation by the state on a matter of municipal concern and an unlawful delegation of a legislative power from the Board of Supervisors of a county to the redevelopment agency with the following analysis: [29]

> It must be remembered that redevelopment, when enacted by the state, is a matter of state interest, and its implementation is in order to effect a state objective. The California Housing Authorities Law is particularly apposite here, since that law gives to housing authorities certain powers as public bodies corporate and politic and not as agents of the city in which they function. '[T]he local operation of an act of general state-wide scope may be made contingent upon determination by local authorities that conditions there require its acceptance and operation.' (*Housing Authority v. Dockweiler,* 14 Cal.2d 437, 446 [94 P.2d 794].) The language used in *Housing Authority v. City of Los Angeles,* 38 Cal.2d 853, 861-862 [243 P.2d 515], is persuasive here: 'Similarly the city under the Housing Authorities Law is an agency of the State, functioning under state law to fulfill state purposes,

and is not acting pursuant to its fundamental law to effect solely municipal objectives. [Citation.] Each functioning body, the city and the housing authority, is a seperate body politic vested with specific duties and powers under the Housing Authorities Law and Housing Cooperation Law to effect a state objective. Neither is functioning independently of that state law. In pursuing the state objective each is governed by the state law and either may exercise powers not vested or recognized by that law. The city and the housing authority function as administrative arms of the state in pursuing the state concern and effecting the legislative objective.' *Fellom v. Redevelopment Agency, supra,* pp. 247-248.

The principle that local government through the redevelopment agency and city council acts as the administrative agent of the state when proceeding under the Community Redevelopment Law was acknowledged by the California Supreme Court *In re Redevelopment Plan of Bunker Hill, supra,* where at page 52 the Court stated:

> In our view *Redevelopment Agency v. Hayes,* (1954), *supra,* 122 Cal.App.2d 777, correctly sets forth the law relating to the delegation of power to a redevelopment agency when it adopts *Belovsky v. Redevelopment Authority* (1947) 357 Pa. 329 [54 A.2d 277, 283, 172 A.L.R. 953], and quotes therefrom at page 807 [20] as follows: " 'The fact is, however, that the act contains as definite a description of what constitutes a blighted area as it is reasonably possible to express; in regard to such factors as the selection and the size of the areas to be redeveloped, the costs involved, and the exact form which the redevelopment in any particular case is to take, it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation . . . . All that the legislature could do, therefore, was to prescribe general rules and reasonably definite standards, leaving to the local authorities the preparation of the plans and specifications best adapted to accomplish in each instance the desired result, a function which obviously can be performed only by administrative bodies. While the legislature cannot delegate the [30] power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act.' "
>
> Although *Hayes* dealt with an agency power to determine blight, the principle announced appears equally applicable to the agency power to effectuate redevelopment.

The principle that a redevelopment agency acts as the administrative arm of the legislature was recently affirmed in *Gibbs v. City of Napa,* 59 Cal.App.3d 148 (1976), ... Cal. Rptr. .....; and *Walker v. City of Salinas,* 56 Cal.App.3d 711 (1976), 128 Cal.Rptr. 832.

The United States Supreme Court has also recognized that redevelopment is a governmental function and thus a proper exercise of the sovereign power of government. *Berman v. Parker,* 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954). Both state and federal courts have recognized that redevelopment is a function of government, a sovereign activity for which public funds may be spent. For that reason the redevelopment activities Rohnert Park objects to are immune from the Sherman Act.

Plaintiff's allegation that Hahn, a private party, will derive a special advantage from redevelopment adds nothing. The expenditure of public funds and local tax revenues to purchase land for resale for private commercial development is a fundamental purpose of the government of redevelopment. Health and Safety Code Section 33036 contains

a legislative determination that the condition of blight cannot be remedied by private enterprise without assistance from government because "private assembly of the land and blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of a legal power and excessive costs." The legislature has further declared in Section 33037(b): [31]

> That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated.

The foregoing statutes constitute the mandate of the state to the Santa Rosa defendants to accomplish redevelopment in precisely the manner objected to by Rohnert Park.

Bunker Hill, supra, the principal California Supreme Court case on redevelopment, rebuts the sugggestion of Rohnert Park that a benefit or advantage to private enterprise deprives redevelopment of its public purpose and governmental legitimacy. The State Supreme Court approved an earlier conclusion of Court of Appeal that:

> *Housing Authority v. Dockweiler, supra,* 14 Cal.2d 437, adopted the broader interpretation as the rule to be followed in this state. It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. In addition, slum clearance for redevelopment purposes is likewise so recognized. To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the myopic eyes of years now gone. . . . In California our courts have followed the broader definition of 'public use' and the cases hereinbefore cited have held that if property is taken for a public use, the fact that it is later to be returned to private ownership subject to restrictions protecting the public use, does not make it any the less a public use. . . . *Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose. Redevelopment Agency v. Hayes,* 122 Cal.App.2d 777, 802-804, 266 P.2d 105 (1954). (Emphasis added)

Redevelopment agencies are also expressly authorized by [32] Article XVI, Section 16 of the California Constitution and Section 33670 through 33674 of the Health and Safety Code to use the tax allocation financing that Rohnert Park complains of in this case. Each aspect of the redevelopment of the Santa Rosa defendants disputed by plaintiff is outside the purview of the antitrust laws both because it is within the scope of the governmental function of redevelopment, as defined by statute and judicial decision, and because it is specifically authorized or directed by state law.

3. *The Economic Consequences Of The Santa Rosa Defendants' Valid Governmental Action Cannot Give Rise To Liability Under The Sherman Act.*

Economic consequences brought about by valid governmental action cannot give rise to liability under the Sherman Act. *American Banana Co. v. United Fruit Co.,* 213 US 347, 358, 53 L.Ed. 826, 29 S.Ct. 511, 16 Ann.Cas. 1047 (1909); *Olsen v. Smith,* 195 US 332, 344, 345, 49 L.Ed. 224, 25 S.Ct. 521 (1904); *Parker v. Brown,* 317 US 341, 351, 87 L.Ed. 315, 63 S.Ct. 307 (1943); *United States v. Rock Royal Co-op., Inc.,* 307 US 533, 560, 83 L.Ed. 1446, 59 S.Ct. 993 (1939); *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.,* 214 F.2d 413 (CA5 Fla, 1954).

With respect to the issues of this suit, the principle is perhaps best exemplified by *Gibson & Perin Co. v. Cincinnati,* 480 Fed.2d 936 (1973). In *Gibson & Perin Co.* the plaintiffs, who owned businesses outside a redevelopment project, charged government discrimination in favor of their private party competitors inside the project area. They claimed, as Rohnert Park does in this suit, that the design and construction of a parking facility within the project gave a special benefit to merchants there and placed them at a competitive disadvantage. As in this case, the plaintiffs' pleading alleged that the parking facility was approved pursuant to an unauthorized change in the redevelopment plan for [33] the project and "in addition, . . . charged the defendants with violation of their civil rights, conspiracy, fraud, violation of federal and state antitrust laws, and with everything else that they could think of including the charge of depriving them of due process of law and the equal protection of the laws." *Gibson & Perin, supra,* p. 939.

On appeal, the United States Court of Appeal, Sixth Circuit, reversed a judgment partially in favor of plaintiffs and remanded the case to the trial court with instructions to dismiss the complaint. The Court of Appeal rejected the plaintiffs' claims under the Sherman Act with the concise and unambiguous comment: "Participation in an Urban Redevelopment project does not violate the antitrust laws." *Gibson & Perin Co., supra,* p. 946.

The holding of the Court in *Gibson & Perin Co.* follows numerous judicial decisions holding that activities of government agencies are exempt from application of the antitrust laws even if they restrict or inhibit trade or commerce. *Parker v. Brown,* 317 U.S. 341, 87 L.Ed. 315 (1904); *E. W. Wiggins Airways, Inc. v. Mass. Port Authority,* 362 F.2d 52 (1970). This rules applies equally to the plaintiffs charge that rezoning lawsuit of the Santa Rosa defendants against plaintiff somehow violated the antitrust laws. The testimony of Peter Callinan attached to the affidavit of Joseph E. Coomes, Jr., and the pleadings, which are attached to the affidavit of Richard E. Brandt, reveal that the suit involved substantial issues concerning water and sewer systems of the two cities and the plaintiffs admitted refusal to heed the regional plan of the Association of Bay Area Governments. The suit was completed in less than three months of filing. The matters submitted with the affidavits demonstrate that even if the Santa Rosa defendants had not been immune from the Sherman Act, the impacts of the lawsuit on trade or commerce, if any, must be characterized as insubstantial. [34]

III. CONCLUSION

Plaintiff's objections to redevelopment in Santa Rosa and the regional shopping center proposed for the project echo a theme that has been repeatedly raised by those who feel

their economic opportunity for commercial expansion is threatened by competition from the commercial renewal that is a primary goal of downtown business district Urban Renewal. *Gibson & Perin Co. v. City of Cincinnati, supra; Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency,* 310 F.2d 99 (7th Cir. 1962) and *Pittsburgh Hotels Association v. Urban Redevelopment Authority of Pittsburgh,* 202 F.Supp. 486, 309 F.2d 186 (1962), cert.den, 372 U.S. 916 are but three of many cases dealing with the same economic phenomenon complained of by Rohnert Park in this case. In all such cases the plaintiffs claims have been deemed to be without merit. The only response that can be made is the one given by the court in *Pittsburgh Hotel Association* that the admitted economic consequence of redevelopment is damnum absque injuria.

The questions of government involvement in redevelopment and allocation of tax revenues that plaintiff ask this court to resolve have already been determined by the Congress and the Legislature of the State of California. They are preeminently political issues which, for all the reasons given above, should not and cannot be entertained by this court. Santa Rosa defendants respectfully submit that their Motion to Dismiss and Motion For Summary Judgment should be granted.

DATED: August 20, 1976

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation

By RICHARD E. BRANDT
Richard E. Brandt

Attorneys for Defendants City of Santa Rosa [35]

Appendix H(1)

Filed Oct 19 1976
WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY

Alcoa Building, Suite 1400
One Maritime Plaza
San Francisco, California 94111
Telephone (415) 397-4600

Attorneys for Plaintiff

United States District Court
Northern District of California

CIVIL ACTION NO. C 74 2429 WWS

City of Rohnert Park, a municipal corporation,

Plaintiff,

vs.

James T. Lynn, etc., et al.,

Defendants.

AFFIDAVIT OF R. DEAN STAHR

State of California } ss.
County of Napa }

R. DEAN STAHR, being first duly sworn, deposes and says:

1. I reside at 7633 Magellan Way in the City of Napa, Napa County, California.

2(a). I am a real estate appraiser, and I have practiced this profession in California continuously since 1955.

(b). I graduated from the University of Washington with a Bachelor's degree in Economics and Business.

(c). I am a member of the American Institute of Real Estate Appraisers and a member of the California Society of Rural Appraisers.

3. I have rendered services as a real estate appraiser [1] to the following, among others:

(a) The United States Department of Justice;
(b) The City of Santa Rosa;
(c) The Urban Renewal Agency of Santa Rosa;
(d) The Santa Rosa School Districts;
(e) The County of Sonoma;
(f) The Pacific Gas & Electric Company.

4(a). I have been requested by the attorneys for the Plaintiff to render an opinion to be included in this affidavit regarding the fair market value of some of the real property located in Phases II and III of the Urban Renewal Area of the City of Santa Rosa for its highest and best uses permitted under the Santa Rosa Urban Renewal Plan.

(b). I have personally visited and visually observed the property comprised within said Phases of the Urban Renewal Plan as well as the property adjacent thereto and I am entirely familiar with it and the conditions which may influence values therein.

(c). I have read the Urban Renewal Plan of the City of Santa Rosa and I have thereby gained knowledge of the land uses permitted thereunder.

5(a). The property which is the subject of the inquiry contains approximately thirty (30) acres of land. Of these, approximately twenty (20) acres are in Phase II, while the balance are within Phase III. Accordingly, said Phases together contain 1,306,800 square feet of land.

(b). In my opinion, as of the date of this affidavit, these thirty (30) acres or 1,306,800 square feet had an average fair market value for the highest and best uses permitted under the Urban Renewal Plan of $5.00 per square foot or a total of $6,534,000.00.

(c). The foregoing opinion is based on facts disclosed [2] by a study made by me of sixty-one (61) sales of comparable land located in or adjacent to the subject area. Forty (40) of these sales, in which the Urban Renewal Agency was not involved, took place between January 15, 1968 and May 1, 1975, while twenty-one (21) such transactions, in which the Urban Renewal Agency was involved, occurred between December 19, 1961 and October 16, 1974.

(d). In making this study I inspected the records kept in the offices of the Recorder and the Assessor of Sonoma County, as well as the records kept in the office of the Urban Renewal Agency. Then, after having noted the pertinent information contained in the records, I communicated with the principals involved in the transactions to ascertain the actual prices paid and the condition of the properties at the time of the sale. In addition, for the purpose of verifying the information received from the principals, I interviewed the brokers who served as intermediaries in the sales.

(e). I have collected in a booklet summaries of the pertinent facts involved in these transactions together with copies of the underlying records which I inspected while making the study. A true copy of this booklet is attached hereto marked Exhibit "A", and made a part hereof.

(f). This study was made originally to serve as the basis of testimony I gave as a witness for the plaintiffs on May 17, 1976, in the Superior Court of Sonoma County, in the consolidated cases of *Codding Enterprises, et al., Plaintiffs v. Urban Renewal Agency of the City of Santa Rosa, et al., Defendants,* Nos. 79465/79762-84237/81799.

6. The facts above set forth are within my personal [3] knowledge, and if called as a witness in this action I would be competent to testify as to the matters stated herein.

R. DEAN STAHR
R. Dean Stahr

Subscribed and sworn to before me
this 14th day of September, 1976.

Dorothy Ransford
Notary Public in and for the County of Napa, State of California. [4]

DOROTHY RANSFORD
Notary Public
Napa County California
My Commission Expires
October 21, 1979

Appendix H(2)

Filed Oct 19 1976

WILLIAM M. BRINTON
RICARDO J. HECHT
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San Francisco, California 94111
Telephone (415) 397-4600

Attorneys for Plaintiff

United States District Court
Northern District of California

CIVIL ACTION NO. C 74 2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

vs.

James T. Lynn, etc., et al.,
Defendants.

AFFIDAVIT OF ROLAND L. BRUST

State of California
City and County of San Francisco } ss.

ROLAND L. BRUST, being first duly sworn, deposes and says:

I am and have been for approximately two years the Director of Public Works and City Engineer of the City of Rohnert Park, and as such I have the custody and control of the original records concerning the assessment districts within the City created by virtue of resolutions adopted by the City Council and the Board of Supervisors of the Rohnert Park District, a community services district.

Pursuant to the request of Ricardo J. Hecht, an attorney representing the City, I have personally examined these records to determine assessments made and levied on the assessor's parcels which are within the designated commercial area of the [1] City, including the parcels in which mobile home coaches may be installed. Also, pursuant to the request of Mr. Hecht I have had a summary made of what appears in these records by M. Hudis & Associates, consulting engineers of Santa Rosa, California. I have personally reviewed this summary and found that it accurately reflects what appears in said original records. A true copy of said summary, marked "Exhibit A," is attached hereto and made a part hereof.

ROLAND L. BRUST

Subscribed and sworn to before me
this 19th day of October, 1976.
RUBY P. JOHNSON
Notary Public in and for the City
and County of San Francisco, State
of California.

OFFICIAL SEAL
RUBY P. JOHNSON
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission expires Mar. 13, 1979

EXHIBIT A

RECEIVED OCT 1 1976 CITY OF ROHNERT PARK

M. Hudis & Associates/Consulting Civil Engineers

2100 County Center Drive Santa Rosa, California 95401
Telephone (707) 542-8795

September 30, 1976

Mr. Roland L. Brust
City Engineer
City of Rohnert Park
6750 Commerce Blvd.
Rohnert Park, California 94928

Dear Ron:

Enclosed is the information requested by Mr. Ricardo J. Hecht relative to the assessment district proceedings in the commercial areas in the City of Rohnert Park. Please note that we have lumped all of the Cal Tex Equities properties inasmuch as they are all separate individual parcels within the shopping center at the corner of Commerce Blvd. and the Rohnert Park Expressway.

ASSESSMENT DISTRICT 1956-1

A. P. Map No.	Owner	Amount
143–05–16	Rohnert Fred, et al	$ 3,447.00
" " 18	Cofego Enterprises	3,109.00
" " 19	Pahlmeyer, Ralph B. & Helen E.	528.00
" " 20	Leibert, Grant	534.00
" " 26	Forsyth-Clyde	387.00
" " 32	Danna, Dominic F.	1,581.00
" " 33	Poubroy, M. J. & Rosalie	1,356.00
" " 34	McCulloh, Ernest & Wanda	000.00
" " 35	" " "	2,738.00
" " 36	" " "	000.00
" " 37	Bessone, Joseph & Peter	1,205.00
" " 38	" " "	000.00
" " 39	Young, David D. et al	15,336.00
" " 40	" " " "	000.00
" " 41	Cofego Enterprises	16,203.00
" " 42	" "	000.00
" " 43	Caltex Equities	000.00
" " 44	" "	000.00
" " 45	" "	000.00

ASSESSMENT DISTRICT 1956-1
(continued)

A. P. Map No.	Owner	Amount
" " 46	" "	000.00
" " 47	" "	000.00
" " 48	" "	000.00
" " 49	" "	9,729.00
143–05–50	Cofego Enterprises	7,765.00
" " 51	Griner, Thomas E.	2,737.00
" " 53	City of Rohnert Park	000.00
" " 54	Cofego Enterprises	69,982.00
" " 55	City of Rohnert Park	000.00

ASSESSMENT DISTRICT 1965-3

143–05–16	Rohnert Fred, et al	$ 6,717.00
" " 18	Cofego Enterprises	5,866.00
" " 19	Pahlmeyer, Ralph B. & Helen E.	1,024.00
" " 20	Leibert Grant	1,172.00
" " 26	Forsyth-Clyde	1,262.00
" " 32	Danna, Dominic F.	3,226.00
" " 33	Poubroy, M. J. & Rosalie	652.00
" " 34	McCulloh, Ernest & Wanda	000.00
" " 35	" " "	1,620.00
" " 36	" " "	000.00
" " 37	Bessone, Joheph & Peter	5,707.00
" " 38	" " "	000.00
" " 39	Young, David D. et al	11,612.00
" " 40	" " " "	000.00
" " 43	Caltex Equities	
& " " 48	" "	
& " " 49	" "	15,389.00
143–05–50	Cofego Enterprises	$12,708.00
" " 51	Griner, Thomas E.	4,533.00
" " 54	Cofego Enterprises	13,805.00

ASSESSMENT DISTRICT 1968-1

A. P. Map No.	Owner	Amount
143–39–08	Codding Enterprises	$40,521.00
" " 11	Chris C. Knudtsen	8,894.00
" " 12	Codding Enterprises	70,279.00
" " 14	" "	68,844.00
" " 15	Roberts & Aguirre	5,178.00
" " 18	" "	17,333.00
" " 22	Codding Enterprises	8,894.00

ASSESSMENT DISTRICT 1968-1a

143–39–08	Codding Enterprises	$42,470.00
" " 11	Chris C. Knudtsen	4,835.00
" " 12	Codding Enterprises	73,682.00
" " 14	Codding Enterprises	72,626.00
" " 15	Roberts & Aguirre	4,673.00
" " 17	" "	60,888.00
" " 18	" "	17,447.00

ASSESSMENT DISTRICT 1972-7

143–39–14	Codding Enterprises	$95,151.00
" " 22	" "	57,326.00
143–00–38	Rancho Verde	49,259.00

ASSESSMENT DISTRICT 1972-73

143–50–16	Rohnert, Fred et al	$ 4,165.00
" " 20	Leibert, Grant	3,065.00
" " 32	Danna, Dominic F.	1,375.00
" " 33	Poubroy, M. J. & Rosalie	000.00
" " 34	" " "	000.00
" " 35	McCulloh, Ernest N. & Wanda	1,084.00
" " 36	" " "	000.00
" " 37	Bessone, Joseph P. & Peter F.	000.00
" " 38	" " "	000.00
" " 39	Young, David D., et al	13,323.00
" " 40	" " " "	000.00
" " 41	Cofego Enterprises	20,395.00
" " 42	" "	000.00

ASSESSMENT DISTRICT 1974-6

A. P. Map No.	Owner	Amount
143–00–38 &	Rancho Verde	$
143–39–21	" "	75,724.00

If you have any questions please call me at this office.
Yours very truly,

MILTON HUDIS
Milton Hudis
MH:brm

Appendix H(3)

Filed Oct 19 1976

WILLIAM M. BRINTON
RICARDO J. HECHT
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San Francisco, Ca. 94111
Telephone: (415) 397-4600

Attorneys for Plaintiff

United States District Court
Northern District of California

CIVIL ACTION NO. C 74 2429 WWS

City of Rohnert Park, a municipal corporation,

Plaintiff,

v.

James T. Lynn, etc., et al.,

Defendants.

AFFIDAVIT OF CLAUDE GRUEN

State of California
County of San Francisco } ss.

CLAUDE GRUEN, being first duly sworn, deposes and says:

1. I am Principal Economist with Gruen Gruen + Associates, 464 Howard Street, San Francisco, California.

2(a). I am an urban economist and I have practiced this profession in California continuously since 1964.

(b). I hold a BBA degree in business administration, an MA and Ph.D. in economics from the University of Cincinnati.

(c). I have served on the faculties of Xavier University in Cincinnati in the Department of Economics, and the University of California at Berkeley in the School of Business Administration, the Department of City and Regional [1] Planning, and the School of Architecture.

(d). I have experience in the analysis of retailing and commercial real estate projects, having prepared marketing and feasibility studies of regional and specialty shopping centers. Included in this experience was the development of the financial real estate analysis that led to the City of Santa Maria calling for the development of a regional shopping center in its downtown.

(e). I have published reports and articles in the field of urban economics, retailing and locational analysis and real estate analysis.

3(a). I have been requested by the attorneys for the plaintiff to render an opinion as to whether the development and operation of a regional shopping center to serve resident households and visitors to Sonoma County in the area around Santa Rosa and Rohnert Park in Sonoma County, California would be developed and operated in interstate trade.

(b). I have reviewed data on taxable retail sales in Sonoma County and have considered the nature of regional centers of the type that would serve a significant portion of the market for retail goods and services in Sonoma County, whether built in Santa Rosa or Rohnert Park.

(c). I have assumed that a regional shopping center to be built in this area would be similar in scale to the center that Santa Rosa Associates proposes to build in Santa Rosa, California. I have read a letter from Teachers Insurance and Annuities Association of America to Santa Rosa Associates (a limited partnership) dated March 18,

1976, which indicates that that center will include a two-level enclosed mall containing 322,000 square feet of mall stores; 20,865 square feet of freestanding buildings; a 91,788 square foot enclosed [2] mall; and 28,000 square feet of service corridors and management offices. I understand that mall is to connect with a 161,342 square foot Sears-Roebuck & Company department store and TBA, a 135,530 square foot R. H. Macy department store, and a 75,600 square foot Mervyn's department store. In addition, I understand that the proposed center in Santa Rosa is to provide sufficient space for 3,675 cars including deck and surface parking.

4. It is my opinion that the development and operation of a regional shopping center of the type Santa Rosa Associates proposes to develop, or one similar to it, would constitute interstate trade. My opinion is based on the following conclusions:

(a). Large retail department stores operated by Sears-Roebuck & Company, the R. H. Macy Company, or similar stores, purchase a significant proportion of the goods they sell from sources outside of the State of California. Smaller department stores and the type of shops that we developed along the mall of such centers also draw partially from their ability to gather in goods from all over the United States and other countries which they then offer for sale to local residents and visitors.

(b). I have read an affidavit prepared by Kenneth Roberts, employee of Ernest W. Hahn, prepared on the fifth day of August, 1976, which discusses the materials to be used in the construction of the regional shopping center that Santa Rosa Associates proposes to build in Santa Rosa. From reliance on that affidavit and previous knowledge concerning the nature of shopping center construc-

tion, it is my opinion that a significant portion of the materials used to build a regional shopping center in Sonoma County will be produced and manufactured outside the State of California. [3]

5. The facts above set forth are within my personal knowledge and, if called as a witness in this action, I would be competent to testify on the matters stated herein.

CLAUDE GRUEN
Claude Gruen

Subscribed and sworn to before me this 19th day of October, 1976.

RUBY P. JOHNSON
Notary Public in and for the City and County of San Francisco, State of California. [4]

OFFICIAL SEAL
RUBY P. JOHNSON
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission expires Mar. 13, 1979

Appendix I

Original Filed Nov 24 1976
Clerk U.S. Dist. Court
San Francisco

United States District Court
Northern District of California

No. C-74-2429 WWS

City of Rohnert Park, a municipal corporation,

Plaintiff,

v.

James T. Lynn, etc., et al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This is an action by the City of Rohnert Park against the Secretary of the United States Department of Housing and Urban Development ("HUD"), the City of Santa Rosa, the Urban Renewal Agency of Santa Rosa and Ernest W. Hahn, Inc., a corporation, the developer. Rohnert Park is located about seven miles South of Santa Rosa on U.S. Highway 101. It complains that the defendants are engaged "in a scheme to develop a regional shopping center" in Santa Rosa, subsidized by federal funds. In this action, it seeks injunctive relief under Section 16 of the Clayton Act (15 U.S.C. Sec. 26) on the ground that the defendants' activities violate Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2).

Responsive to the Court's request for a statement of the grounds on which the antitrust claim is based, [1] plaintiff submitted the following statement which is quoted in full:

"Santa Rosa is located some seven (7) miles north of Rohnert Park. Rohnert Park has designated certain property within its boundaries as a site for a regional shopping center (Complaint, p. 3, lines 20-31).

There is currently in the Rohnert Park area a demand for approximately 627,000 square feet of retail space. There are developers who are ready, willing and able to supply this demand, but they are inhibited from so doing by the threat of a competing center planned by defendant Agency (Complaint, p. 4, lines 21-27).

Defendant Agency has entered into an agreement with defendant Developer, with the consent of defendant HUD, to develop a competing shopping center on a thirty-two (32) acre site in downtown Santa Rosa (Complaint, p. 5, lines 6-12; p. 6, lines 24-26).

There are presently approximately 748,000 square feet of general merchandise space available in Santa Rosa. Under the terms of said agreement defendant Developer will construct an additional 438,000 square feet of general merchandise space, thus increasing the total of such space in Santa Rosa to 1,186,000 square feet. Under the terms of said agreement defendant Developer will also build 322,000 square feet of other retail space in the proposed shopping center site. *'The excess retail space capacity to be so created will not be absorbed by the demand therefor until some time after the year 1980.'*[5] Hence this project will render non-competitive and impractical any project for a retail center in the proximity of Santa Rosa (Complaint, p. 9, lines 18-30).[6]

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5. All emphasis added to quoted material is supplied by us, unless otherwise indicated.

6. Plaintiff's allegations above summarized have not been 'pierced' by affidavits or other materials upon which motions for summary judgment may be grounded, and hence Plaintiff may *rest upon them* to establish that it has a valid claim for relief."

Plaintiff makes no claim that defendants either in conspiracy or otherwise engaged in any restrictive practices such as the fixing of prices, the imposition of exclusionary clauses or territorial restraints, or any other [2] type of conduct condemned as anticompetitive. Plaintiff's claim, pure and simple, is one of attempted preemption of future opportunities of others to compete by the planned construction of alleged excess retail store capacity.

The defendants have moved for summary judgment. We assume, for purposes of those motions, that the defendants' relevant activities are in interstate commerce.

In opposing these motions, plaintiff relies primarily on *In re Multidistrict Vehicle Air Pollution,* 538 F.2d 231 (9th Cir. 1976) and *United States v. Aluminum Co. of America,* 148 F.2d 416 (2nd Cir. 1945).

In *In re Multidistrict Vehicle Air Pollution,* the Ninth Circuit recognized that relief under Section 16 of the Clayton Act may be available in cases where Section 4 treble damages cannot be recovered because plaintiff can show no proximately caused injury to its business or property. The court also recognized that Section 16 may provide relief serving purposes other than restoring competition. Cf. *Bratcher v. Akron Area Board of Realtors,* 381 F.2d 723 (6th Cir. 1967) (reversing an order dismissing complaint for lack of jurisdiction). But the court made it clear that, regardless of what collateral purposes may be served, injunctive relief can only be granted against ongoing violations of the antitrust laws. (538 F.2d at 235-236)

The *Multidistrict* case, therefore, merely confirms the right to injunctive relief where plaintiff is able to establish an ongoing violation of the antitrust laws. It does not answer the question whether plaintiff's pleadings here raise a triable issue respecting the existence of such a violation.

In this regard, plaintiff places its reliance on *United States v. Aluminum Co. of America,* above. The language on which it relies, however, is taken out of context. [3] *Alcoa* does not make the creation of excess capacity a violation of the antitrust laws. On the contrary, the opinion clearly states that size alone is not an offense against the Sherman Act where it has been lawfully acquired. "The successful competitor, having been urged to compete, must not be turned upon when he wins." (148 F.2d at 430) Alcoa was condemned in that case not for possessing a monopoly, but for having abused it. (148 F.2d at 429-430) The decision discusses various acts of Alcoa by which it abused its monopoly in the aluminum ingot market, one of which was its effort to control that market by the continued expansion of its ingot production capacity to prevent others from entering the market (this being the passage quoted in plaintiff's memorandum).

Aside from the fact that plaintiff has misconceived the significance of *Alcoa,* its reliance on that case must founder on the elementary proposition that defendants here, unlike in *Alcoa,* have no monopoly whatever. The most that can be said of them is that they are engaged in developing a regional shopping center. Whether that shopping center, if, as or when built, could then be found to be a monopoly is anybody's guess—and will be no more than that at the time of a trial on plaintiff's instant complaint for an injunction against its construction.

This case therefore simply does not qualify as a monopolization case. But even assuming plaintiff could overcome that obstacle and state an attempt to monopolize case, it would still have to establish a specific intent to monopolize. See, *Hanson v. Shell Oil Co.,* No. 74-1034 (9th Cir., Sept. 3, 1976, Slip. Op. p. 7); *Hiland Dairy, Inc. v. Kroger Company,* 402 F.2d 968 (8th Cir. 1968). Plaintiff offers nothing from which a trier of fact can find such [4] a specific intent. (See plaintiff's statement of its case quoted above.) Certainly the entirely lawful purpose to revitalize downtown Santa Rosa by the development of a regional shopping center that will deter a flight of population and business to the suburbs could not sustain such a finding.

There are in this case none of the charges of anticompetitive or predatory conduct which normally provide the foundation for a finding of specific intent. See *Dahl Inc. v. Roy Cooper Co.,* 448 F.2d 17 (9th Cir. 1971).[1] In fact all but one of the defendants are government agencies or officials and the conduct complained of consists substantially of the exercise of their lawful duties and authorities, relief against which would in any event be barred by *Parker v. Brown,* 317 U.S. 341, 351 (1943).

It thus appears that plaintiff's case boils down to nothing more than an attempt to enjoin the lawful construction of a shopping center which, if built, might place at a competitive disadvantage any shopping center that might in the future be built within the limits of the plaintiff city.[2] That is not a case entitling plaintiff to relief under Section 16 which is limited to "ending ongoing violations." Inasmuch as plaintiff has made no showing from which a trier of fact could find ongoing violations of the antitrust laws, defendants'

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1. Plaintiff's opposition memorandum refers to the filing of a lawsuit by Santa Rosa to enjoin plaintiff from granting applications to rezone property for commercial development, since terminated. The filing of such a lawsuit is absolutely privileged and not actionable. See, *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board,* (Ninth Circuit No. 73-2727, Sept. 17, 1976) (CCH T.C. para. 61,102).

2. In *Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 936 (6th Cir. 1973), the court upheld the dismissal after trial of a similar antitrust claim, terming it "frivolous."

motions for summary judgment must be and they hereby are granted.

Dated: November 23, 1976.

WILLIAM W. SCHWARZER
United States District Judge [5]

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Appendix J

United States District Court
Northern District of California

No. C-74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

JUDGMENT

This action came on for hearing before the Court. Honorable William W. Schwarzer, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that summary judgment is granted, there being no genuine issue of material fact, and the action is hereby dismissed, each party to bear its own costs.

Dated at San Francisco, California this 6th day of December, 1976.

WILLIAM W. SCHWARZER
William W. Schwarzer
United States District Judge

Appendix K

Original Filed
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United States District Court
Northern District of California

CIVIL ACTION NO.
C 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

NOTICE OF APPEAL

NOTICE is hereby given that CITY OF ROHNERT PARK, plaintiff above named, appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Summary Judgment filed in this action on November 24, 1976, and from the separate Judgment entered

pursuant to the Order Granting Summary Judgment on December 8, 1976.

Dated: December 15, 1976.

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Appendix L

Filed May 9 1979
Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

JAMES T. LYNN, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and KILKENNY, Circuit Judges and PFAELZER,* District Judge.

WRIGHT, Circuit Judge:

The City of Rohnert Park sought to enjoin the appellees, City of Santa Rosa, the Urban Renewal Agency of Santa Rosa (Agency), the Department of Housing and Urban Development (HUD), and Ernest W. Hahn, Inc. from developing a regional shopping center as part of an urban renewal project. Rohnert Park asserted that the shopping center project violated §§ 1 and 2 of the Sherman Act, 15

*Of the Central District of California.

U.S.C. §§ 1, 2 [1] (West Supp. 1978), as a restraint of trade and as the product of an alleged conspiracy or attempt to monopolize retail merchandise space in the Santa Rosa trade area. The plaintiff also alleged that Santa Rosa sold the urban renewal land, with HUD approval, at less than fair value in violation of the Housing and Development Act of 1965, 42 U.S.C. § 1460(c)(4)(1969).

Upon the appellees' motions for summary judgment, the district court found that Rohnert Park had failed to substantiate its antitrust allegations. Rohnert Park appeals.

FACTS

Rohnert Park and Santa Rosa, located within seven miles of one another, each wanted to develop a regional shopping center. Rohnert Park's master plan, adopted in 1966, designated areas within its boundaries as a commercial zone. The facilities proposed for the zone included a regional shopping center. The city owns two parcels within the commercial zone. Through the use of special assessment funds, it has improved the zone to render it suitable for development.

Santa Rosa's regional shopping center plan is part of an urban renewal and redevelopment project in the downtown area. The original urban renewal site, developed pursuant to the California Community Redevelopment Law, Cal. Health & Safety Code § 33000, *et seq.* (West 1973), was expanded after an earthquake created additional blighted land in need of redevelopment. [2]

Hahn was selected to develop the project. A tentative agreement entered into by the Agency and Hahn prescribed the terms of sale and conditions of development. In consideration for the site, Hahn agreed to pay $2 million, to construct and maintain parking facilities at its expense, and to make them available to the public.

Following the Agency's tentative agreement with Hahn, this suit was filed together with others, including a validating proceeding brought by Codding Enterprises[1] in state court. *See Codding Enterprises, et al. v. Urban Renewal Agency of the City of Santa Rosa, et al.,* Nos. 79465, 79762, 81799, 84237, (Sonoma County Superior Court, unpublished opinion filed Dec. 7, 1976), *rev'd and remanded in part,* 1 Civil 41188 (Ct. App., unpublished opinion filed Apr. 26, 1978), *hearing denied,* (Sup. Ct., June 28, 1978).[2] In the validating proceeding, the superior court held, *inter alia,* that there were no state antitrust violations and that the sale price set forth in the tentative agreement was fair and equitable and not in violation of 42 U.S.C. § 1460(c)(4). That holding was not disturbed on review by the state court of appeals.

THE ANTITRUST VIOLATIONS

In this suit, Rohnert Park alleges that the appellees engaged "in a scheme to develop a regional shopping center" in violation of federal antitrust laws.[3] The district

1. Codding Enterprises, a developer based in Rohnert Park, owns shopping centers in the area. It also owns much of the land in Rohnert Park which was to be part of the proposed Rohnert Park shopping center.

2. Other related actions include an earlier suit by Codding Enterprises, *Codding Enterprises v. Urban Renewal Agency of the City of Santa Rosa,* 1 Civil 36299 (Ct. App., unpublished opinion filed Oct. 23, 1975), and cross suits by Hahn and Codding Enterprises against one another for antitrust violations, *Ernest W. Hahn, Inc. v. Codding,* 423 F. Supp. 913 (N.D. Cal. 1976).

3. The federal antitrust laws require that the alleged violations have some nexus with interstate commerce in order for jurisdiction, finding a sufficient nexus with interstate commerce. Its position is supported by *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738 (1976). We assume, without deciding, that, if Rohnert Park could establish that antitrust violations occurred, the effects on interstate commerce would be sufficient to confer jurisdiction.

court granted summary judgment for the appellees on the ground that the plaintiff failed to show material facts from which a trier of fact could find ongoing violations of the antitrust laws. [3]

We need not reach the question whether summary judgment was appropriate on that ground. We conclude, instead, that the district court should have dismissed the action because Rohnert Park lacked standing.

Rohnert Park did not seek damages for the alleged antitrust violations. It sought only injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (West Supp. 1978). That section provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anttirust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, ...

In *State of Hawaii v. Standard Oil Company of California,* 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd,* 405 U.S. 251 (1972), we noted that the standing requirements under § 16 of the Clayton Act are broader than those under § 4 of the Act, which provides for recovery of treble damages only by a party injured in his business or property by reason of an antitrust violation. 15 U.S.C. § 15 (1973).

To have standing under § 16, a plaintiff must show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *Buckley Towers Condominimum, Inc. v. Buchwald,* 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977); *In Re Multidistrict Vehicle Air Pollution M.D.L.*

No. 31, 481 F.2d 122, 130 (9th Cir.) *cert. denied*, 414 U.S. 1045 (1973).[4] [4]

Rohnert Park alleges that if a regional shopping center is constructed as part of the Santa Rosa urban renewal project, it will discourage the development of a similar center in Rohnert Park. Relying upon *In Re Multidistrict*, 481 F.2d at 130-31, it argues that this threatens injury to interests cognizable in equity, for which it is entitled to § 16 relief.

In *In Re Multidistrict* we discussed two types of interests which can confer § 16 standing upon a state: the interests of citizens asserted by the state as *parens patriae* and the state's own proprietary interests. We found that plaintiff states had standing as *parens patriae* to seek equitable relief under § 16 in a suit alleging a conspiracy by the automobile industry to suppress antipollution technology.

Rohnert Park essentially asserts standing here as *parens patriae* on behalf of its property owners, taxpayers, and inhabitants who might be injured by the loss of investment profits and tax revenues if the center is not built in Rohnert Park. Its argument fails because "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*, . . ." *In Re Multidistrict*, 481 F.2d at 131.

Political subdivisions may, however, "sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." *Id.* Rohnert Park asserts two such proprietary interests. First, it con-

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4. One court concluded:
[i]t is apparent from the language of § 16 that the applicable standing rules in suits to enjoin antitrust violations are the general rules of standing. The plaintiff need show only that he is threatened by injury proximately caused by the defendant.

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976) (footnotes ommitted). [i]

tends that it acted in a proprietary capacity in raising and disbursing the special assessment funds used to improve the commercial zone. It cites no authority supporting the contention that this is a sufficient proprietary [5] interest, and we decline to so hold.

Second, Rohnert Park argues that as the owner of property within the commercial zone, it possesses the requisite proprietary interests. That property, however, is designated as a library site and as such is not directly affected by the location of the regional shopping center.

Because it cannot assert the interests of its citizens, and has no proprietary interest of its own to vindicate, Rohnert Park fails to show an interest cognizable in equity, the first requirement for standing under § 16. Even if it could establish such an interest, it fails to meet the second requirement for § 16 standing; it has shown neither threat nor harm proximately resulting from a violation of the antitrust laws.

Although antitrust violations were not involved in *Warth v. Seldin*, 422 U.S. 490 (1975), that case presents an analogous situation. The question there was whether citizens of one town had standing to complain of the tax and revenue consequences and violations of third party rights caused by the zoning practices of a neighboring town which tended to discourage the development of low income and minority residences. The Court stated that

> [p]etitioners here . . . rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

Warth v. Seldin, 422 U.S. at 507.

Given the trade area, as Rohnert Park defined it, and the limited demand for new retail shopping center space in the area, any competition, whether or not it violates the anti-

trust laws, might have similar adverse effects on the [6] city's commercial development. Furthermore, Rohnert Park has not made a sufficient showing that, absent the alleged antitrust violations by appellants, its commercial area would have been selected as a site for shopping center development. As in *Warth,* the question whether these appellants would have benefited but for appellees' actions is entirely speculative. They have not demonstrated potential injury which confers standing to sue under § 16.

THE HOUSING ACT VIOLATION

As a separate claim apart from the antitrust allegations, Rohnert Park asserts that appellees HUD and the Agency violated 42 U.S.C. § 1460(c)(4) and HUD regulations by selling the shopping center land to Hahn at less than fair market value.[5]

The district court did not address this issue, but it was decided adversely to Rohnert Park's position in the state validating proceeding. *Codding Enterprises v. Urban Renewal Agency of Santa Rosa,* Nos. 79465, 79762, 81799, 84237 (Sonoma County Superior Court, unpublished opinion, filed Dec. 7, 1976), *rev'd and remanded in part on other grounds,* 1 Civil 41188 (Ct. App., unpublished opinion filed Apr. 26, 1978), *hearing denied,* (Sup. Ct., June 28, 1978).

The state court reached the following conclusions of law:

> 3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record. [7]

5. We need not reach the question whether Rohnert Park has standing to bring this suit under the Housing Act since we hold that it is collaterally estopped from relitigating the question of price.

> 4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the revelopment project area for not less than its fair value for uses in accordance with the redevelopment plan.

According to California Health & Safety Code § 33503 (West 1973), the determination in the validating proceeding precludes relitigation of the same issue. Section 33503 provides in pertinent part:

> The judgment [in a validating proceeding], if no appeal is taken, or if taken and the judgment is affirmed shall be forever binding and conclusive as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other parties and if the judgment determines that . . . the redevelopment plan is valid and effective. . . . the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issues as to which the judgment is binding and conclusive.

Under this provision, even though Rohnert Park was not a party to the validating proceeding, it would be barred from relitigating the fairness of the site sale price in state court. *See City of Ontario v. Superior Court,* 2 Cal.3d 335, 341, 466 P.2d 693 (1970) (interested party must bring validating proceeding within time and manner specified by Cal. Civ. Pro. § 860 (West Supp. 1978) or be forever barred from contesting the validity of agency action in a court of law).

Rohnert Park argues that the state validating proceeding does not bar adjudication of this issue in federal court. However, a recent Supreme Court decision establishes that state court judgments may have a collateral [8] estoppel effect upon litigation of specific issues in federal court.

In *Montana v. United States,* 47 U.S.L.W. 4190 (Feb. 20. 1979), the contractor on a federal project in Montana sued in state court, challenging the constitutionality of a state gross receipts tax imposed upon contractors working on federal, but not private, projects. The government sued in federal district court in Montana on substantially the same constitutional issues. The Montana Supreme Court decided the issues adversely to the contractor.

Although the government had not been a party to the action in state court, the United States Supreme Court held that the state court decision precluded the government's action in district court. The Court explained that the government was collaterally estopped from relitigating the issues because it had financed and controlled the state litigation. It stated: "although not a party, the United States plaintiff had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." 47 U.S.L.W. at 4192 (citing *Drummond v. United States,* 324 U.S. 316, 318 (1945)).

Here, although there is no evidence that Rohnert Park directed Codding Enterprises' suit in state court,[6] it had ample notice of that suit and an opportunity to participate. Codding Enterprises had no interests contrary to those asserted by Rohnert Park. In fact, Rohnert Park brought

6. Appellees allege, however, that Codding Enterprises contributed to the attorneys' fees fund for this suit.

this suit expressly on behalf of property owners such as Codding Enterprises.[7]

Section 33503 evidences a strong state interest in settling, in one forum, all questions regarding the validity of redevelopment plans. Rohnert Park offers no persuasive reason why we should disregard this provision [9] and reopen the question adjudicated in the earlier action. Consequently, we give effect to § 33503 and hold that resolution of the fair price issue in the validating proceeding bars parties who had notice and the opportunity to participate in the state proceeding from relitigating that issue in federal district court.

We remand to the district court for dismissal in accordance with this opinion. [10]

7. The validating proceeding in state court may be analogized to a class action suit, with Rohnert Park in the position of an unnamed class member who did not participate in the suit. In *Gart v. Cole,* 263 F.2d 244 (2d Cir.), *cert. denied,* 259 U.S. 978 (1959), the plaintiffs, unnamed members of the class of plaintiffs represented in an earlier state court action, sought to attack the validity or an urban renewal project in federal court on the same grounds employed in the previous state court action. The state court judgment was final. The court in *Gart* held that the second group of plaintiffs was barred from relitigating in federal court the issues decided in state court, even though those issues included constitutional questions.

The court found that there was no valid constitutional objection to holding the second plaintiffs bound by the earlier judgment since "[a]ll had ample notice of the suit; parties plaintiff there had no interests contrary to appellants in this action; and the same counsel prosecuted both suits." *Gart v. Cole,* 263 F.2d at 248. The court reasoned that

> [a]s members of the classes of plaintiffs represented in the . . . [earlier] case, appellants are barred by the judgment there from relitigating these issues with these defendants in the New York courts. . . . And the full-faith-and-credit clause requires a federal court to give equal effect to that judgment as a bar to relitigation of these issues. . . .

Gart v. Cole, 263 F.2d at 247-48 (citations omitted).

Although the prior state court proceeding in *Gart* was a class action suit, and the second group of plaintiffs were members of the class bound by the judgment, the court of appeals' reasoning is just as applicable here. [ii]

Appendix M(1)

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1979 May 22 AM 10:06

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In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park,
Plaintiff-Appellant,

v.

James T. Lynn, Secretary, et al.,
Defendants-Appellees.

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35, FEDERAL RULES OF APPELLATE PROCEDURE

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SUBJECT INDEX

Page

Introduction 1

I. The Points of Law and Fact Which This Court Has Overlooked or Misapprehended
A 2
B 9

TABLE OF AUTHORITIES CITED

Pages

Armond Schmoll Inc. v. Federal Reserve Bank (1941) 37 N.E.2nd 225, 286 N.Y. 503 cert. den. 315 U.S. 818, 87 L.Ed. 1215 8
Beck v. Jennes (1849) 7 Howard 612, 12 L.Ed. 841..... 9
City of Davis v. Coleman (C.A. 9) 521 F.2d 611 (1975) 1, 2, 12
City of Seattle v. Stirrat (1909) 55 Wash. 560, 104 Pac. 834 .....12, 13
815 Mission Corp. v. Superior Court (1971) 22 C.A.3d 604 8
Ex Parte Shockley (D.C. Ohio) 17 F.2d 133 (1926) 8
Fieger v. Glenn Oaks Village (1956) 132 N.E.2nd 492 8
Mach-Tronics Inc. v. Hon. Alfonso Zirpoli, Judge (C.A. 9) 316 F.2d 820 (1963) 9
Mid-West Paper Products Co. v. Continental Group, Inc. (C.A. 3) ..... F.2d ....., 1979—1 Trade Cases 77070 14
Montana v. United States, 47 U.S.L.W. 4190 (Feb. 22, 1979) 5
No Oil Inc. v. City of Los Angeles (1974) 13 C.3d 68 4
O'Loane v. O'Rourke (1965) 231 C.A.2d 774 12
Prout v. Starr (1903) 188 U.S. 537, 47 L.Ed. 584 ..... 9[i]
Rickey Land & Cattle Company v. Miller & Lux (1910) 218 U.S. 258, 54 L.Ed. 1032 9

Pages

State of Alabama v. Rogers (D.C. Ala.) 187 F.Supp. 848 (1960) 8
State of California v. Automobile Mfgs. Assn. (C.A. 9) 481 F.2d 122 (1973) 2, 10
State of Washington v. Automobile Mfgrs. Assn. (C.A. 9) 538 F.2d 231 (1976) 2
Topanga Ass'n for a Scenic Community v. County of Los Angeles (1974) 11 C.3d 506 4
United States v. Silliman (D.C. N.J.) 65 F.Supp. 665 (1946) 6

RULES

Federal Rules of Appellate Procedure
Rule 35 ..... 1, 14
Rule 40 ..... 1, 14
Federal Rules of Civil Procedure
Rule 56 11
Federal Rules of Evidence
Rule 201 5

STATUTES

28 U.S.C. 1331 2
28 U.S.C. 1337 2
Administrative Procedure Act
5 U.S.C. 701 et seq. 2, 3
5 U.S.C. 702 6
5 U.S.C. 704 6
5 U.S.C. 706 7
5 U.S.C. 706(2)(A) 6
Clayton Act (15 U.S.C. 26) 10
Section 1 2
Section 2 2
Section 4 14

Pages

Section 16 ..... 9, 14
Section 26 ..... 2[ii]
National Housing Act of 1949, as amended
42 U.S.C. 1460(c)(4) 3, 6, 7
42 U.S.C. 1441 et seq. 2
California
Health & Safety Code
Sections 33501-33502 3
Sections 33501-33503 6
Section 33503 5
Public Resources Code (CEQA)
Sections 21000 et seq. 4

TEXTS

2 Am.Jr.2d Administrative Law, Sec. 734 8
21 C.J.S. Courts, Sec. 525 8
Collateral Estoppel by Judgment, Scott 56 Harvard L.R. 2, 18 (1942) 8
Exclusive Jurisdiction of the Federal Courts in Private Civil Actions
70 Harvard L.R. 509 (1957) 7

MISCELLANEOUS

HUD Urban Renewal Handbook 7214.1, Rev 8/74, Ch. 1 7
Webster's New Collegiate Dictionary (1959), G. & C. Merriam Co.) ..... 10[iii]

In the United States Court of Appeals
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No. 77-1017

City of Rohnert Park,
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Defendants-Appellees.

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35 FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTION

On May 9, 1979, the Opinion of the Court in the above-captioned case was filed. This Court states therein (p. 10, Slip Opinion): "We remand to the District Court for dismissal in accordance with this opinion." Plaintiff Appellant CITY OF ROHNERT PARK respectfully petitions this Court for a rehearing of its Opinion and order of remand for all the reasons hereinafter set forth. Plaintiff-Appellant also suggests that a hearing in banc may be appropriate to secure or maintain uniformity of the decisions of this Court. City of Rohnert Park respectfully submits that the Opinion of this Court is inconsistent with decisions of the Ninth Circuit in *City of* [1] *Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975), *State of Washington v. Automobile Mfgrs. Assn.* (C.A. 9) 538 F.2d 231 (1976) and *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973).

I

THE POINTS OF LAW AND FACT WHICH THIS COURT HAS OVERLOOKED OR MISAPPREHENDED

A. By its Opinion of May 9, 1979, this Court has introduced a wholly novel and, indeed, revolutionary concept of law; namely, that a state court *in rem* proceeding filed *after* this action and one in which Appellant City of Rohnert Park and Appellee *Secretary of Housing and Urban Development* were not parties, ousts the United States District Court of the "original (and exclusive) jurisdiction" entrusted to it by Congress. See 28 U.S.C. 1331 (cases arising under the laws of the United States) and 28 U.S.C. 1337 (cases arising under the federal antitrust laws). Appellant brought its action under the National Housing Act of 1949, as amended (42 U.S.C. 1441 et seq.), 15 U.S.C. §§ 1, 2, 26 and the Administrative Procedure Act, 5 U.S.C. 701 et seq. (R. 001), naming therein as a principal defendant the Secretary of Housing and Urban Development. Its "Complaint For Declaratory and Injunctive Relief" (hereinafter Complaint) was filed in the United States District Court, the *only* court with "original (and exclusive) jurisdiction" of the claims for relief set forth therein including those asserted against the Secretary of Housing and Urban Development, on November 19, 1974 (R. 001) *prior* to any [2] state court validation proceeding purportedly brought under Sections 33501-33502, California Health & Safety Code. The first of the two validation proceedings (No. 79762) was filed on December 27, 1974, and the First Amended Complaint therein was filed on August 19, 1975 (R. 247). The second validation action (No. 84237) was filed on December 3, 1975 (R. 279). See also Affidavit of Richard E. Brandt In Support of Motion For Summary Judgment and Motion to Dismiss (R. 242-246) stating these

were the two validation actions filed and those to which this Court adverted. Consequently, Rohnert Park was not "relitigating the question of (land disposition) price" (See Fn. 5, Slip Opinion), since it sought relief in the United States District Court under the Administrative Procedure Act (5 U.S.C. 701 et seq.), long before any state court purported to determine "fair value" under 42 U.S.C. 1460(c)(4). "*Fair value*" for the land disposition price in a federally assisted urban renewal project *must be determined by Appellee HUD*. See 42 U.S.C. 1460(c)(4) and the regulations promulgated thereunder. It cannot be determined by a state court.

In fact, the Codding Enterprises Inc. validation actions are not yet final in that no final judgment can be entered by the Superior Court for Sonoma County. The reason is set forth at pages 7 and 8 of the unpublished opinion of the Court of Appeal (1 Civil 41188). This opinion is attached to a request for Judicial Notice supposedly filed with this Court by Appellees Urban Renewal Agency of the City of Santa Rosa and [3] City of Santa Rosa (hereinafter Santa Rosa Appellees) on November 21, 1978. In its opinion, the Court of Appeal, First Appellate District, found the environmental impact report (EIR) required by state law to be insufficient, citing *Toponga Ass'n for a Scenic Community v. County of Los Angeles* (1974), 11 C.3d 506, 515. Accordingly, it reversed the Superior Court with directions that the issue of the EIR's sufficiency ". . . be remanded by the trial court to those two bodies (the Urban Renewal Agency and Santa Rosa City Council) for reconsideration of their findings approving the E.I.R." No final judgment in the validation action can be filed until there is a legally sufficient EIR, since one is required *before* the proposed Santa Rosa regional shopping center can be built at all. See

California Environmental Quality Act (CEQA), California Public Resources Code, Sections 21000 et seq. and *No Oil Inc. v. City of Los Angeles* (1974) 13 C.3d 68. There the Supreme Court of California expressly held that: ". . . environmental issues be considered and resolved (in an EIR) before a project is approved." 13 C.3d at page 75. Since the challenge by Codding Enterprises to the sufficiency of the legally required EIR has not yet been finally determined by the state courts, the validation cases relied upon by this Court are not conclusive for any purpose in this action. In fact, the four cases to which this court referred, Nos. "79465, 79762, 81799 and 84237," by "Order" of the Superior Court filed on April 11, 1979, have been ". . . reset for trial setting conference calendar on June 20, 1979. . . ." Appellant requests this Court to take [4] judicial notice of the language quoted from said "Order." Rule 201, Federal Rules of Evidence.

From this, it follows that this Court overlooked or misapprehended the fundamental legal underpinning for its rationale (p. 9, Slip Opinion) that: "Section 33503 evidences a strong state interest in settling, in one forum, all questions regarding the validity of redevelopment plans." To put it another way, a validation proceeding cannot validate the failure to prepare and approve a legally sufficient EIR covering the project contemplated in the redevelopment plan. Entirely aside from the fact that Appellant never challenged the Santa Rosa Appellees' redevelopment plan, "all questions" concerning it have not yet been finally settled in any state court.

To support its decision, this Court relies on *Montana v. United States,* 47 U.S.L.W. 4190 (Feb. 22, 1979). There, the Supreme Court stated, at 4192: "Under collateral estoppel, once an issue is actually and necessarily determined by a

court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action *involving a party to the prior litigation.*" (Citation omitted and emphasis added.) Rohnert Park was not a party "to the prior litigation," so there can be no collateral estoppel as to it. Hence, the doctrine of *Montana v. United States,* supra, is not applicable herein. This Court, conceding, as it did, ". . . that Rohnert Park (did not) direct(ed) Codding Enterprises' suit in state court, . . .", this Court could only have used collateral estoppel on [5] the *suspicion* that it might have directed and controlled the state court suit. Clearly, in our system of jurisprudence, cases cannot be decided on the basis of suspicion.

Entirely aside from the fact that a state court has no jurisdiction to decide a federal question case, *United States v. Silliman* (D.C. N.J.) 65 F.Supp. 665, 669 (1946), and is thus not "a court of competent jurisdiction," the issue has not, as Appellant has shown, been "actually and necessarily determined." Moreover, Sections 33501-33503, California Health & Safety Code, do not expressly or by necessary implication permit state court validation of "fair value" under 42 U.S.C. 1460(c)(4). Congress expressly entrusted this determination to Appellee HUD, an agency of the United States.

At this point, Appellant City of Rohnert Park directs the attention of this Court to its claim for relief against Defendant-Appellee Secretary of HUD under the Administrative Procedure Act, 5 U.S.C. 702 and 704 (R. 002, 007 and 016) for its failure to comply with 42 U.S.C. 1460(c)(4) and the regulations promulgated thereunder. Appellant has asked for affirmative relief against the Secretary of HUD, namely, to set aside the illegal approval of the land disposition price as "arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law." See 5 U.S.C. 706(2)(A). Consequently, the "Conclusions of Law" relied upon by this Court as the basis for its collateral estoppel rationale are really quite irrelevant, since they deal *only* with what the Santa Rosa Urban Renewal Agency did [6] as disclosed in the validation proceeding, *not* what the Secretary of HUD did here, and did in a manner "not in accordance with the law", as shown by the record. In fact, the record in this case shows without conflict or contradiction that the Secretary of HUD violated 42 U.S.C. 1460(c)(4) and the regulations promulgated thereunder. The facts showing the Secretary's wrongful conduct are summarized at pages 16 to 21 of Appellant's Reply Brief, and these facts are undisputed.

There is no finding of fact or conclusion of law in the state court proceedings that the Secretary complied with the provisions of 42 U.S.C. 1460(c)(4) or the regulations thereunder (HUD's Urban Renewal Handbook Ch. 1, 7214.1, Rev 8/74). Nor could there be any such finding or conclusion in a state court proceeding, since the United States District Court has exclusive jurisdiction in a case where ". . . a complaint directly requests the affirmative relief provided by the statute (5 U.S.C. 706). Such an action is considered as 'arising under' that statute and is therefore exclusively within the jurisdiction of the federal courts." See "Exclusive Jurisdiction of the Federal Courts in Private Civil Actions," 70 Harvard L.R. 509, 510 (1957).

Furthermore, where a state court has no jurisdiction to determine a cause of action in a federal question case, its judgment is void. A void judgment will not extinguish the cause of action sued upon in the United States District Court, either by way of merger or bar. So also, it will not operate by way of collateral estoppel in a subsequent suit

based upon a [7] different cause of action. See Scott "Collateral Estoppel by Judgment," 56 Harvard L.R. 2, 18 (1942). See also *Armond Schmoll Inc. v. Federal Reserve Bank* (1941) 37 N.E.2nd 225, 227, 286 N.Y. 503 cert. den. 315 U.S. 818, 87 L.Ed. 1215. There the court, stating that the issue was ". . . whether the manner of performance of a specific federal government statutory function by a federal statutory agency can be the subject of a decree of a state court . . .," held that it could not be, because ". . . assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution." Cf. *Ex Parte Shockley* (D.C. Ohio) 17 F.2d 133, 137 (1926), and *815 Mission Corp. v. Superior Court* (1971) 22 C.A.3d 604, 625, where a state court held that the Secretary of Housing and Urban Development could not be made a party to proceedings in the state court without his consent. Other cases are in accord. See *Fieger v. Glenn Oaks Village* (1956) 132 N.E.2nd 492, 494-495 and *State of Alabama v. Rogers* (D.C. Ala.) 187 F.Supp. 848, 852 (1960). See also 21 C.J.S. Courts, Sec. 525 at page 796 and 2 Am.Jr.2d Administrative Law, Sec. 734 at page 634. The latter states that a state court has no jurisdiction to direct, compel or control the performance by a federal officer of a duty imposed upon him by a federal statute.

Finally, it is well settled that the jurisdiction of the federal court cannot be defeated or impaired by the institution, by one of the parties, of subsequent proceedings involv- [8] ing the same legal questions, in state court. *Prout v. Starr* (1903) 188 U.S. 537, 544-545, 47 L.Ed. 584, 588 and *Beck v. Jennes* (1849) 7 Howard 612, 624-625, 12 L.Ed. 841, 846. The Supreme Court has also held that the authority of the court first acquiring jurisdiction, the

parties being the same, must prevail in cases of concurrent jurisdiction. *Rickey Land & Cattle Company v. Miller & Lux* (1910) 218 U.S. 258, 262, 54 L.Ed. 1032, 1038. See also *Mach-Tronics Inc. v. Hon. Alfonso Zirpoli, Judge* (C.A. 9) 316 F.2d 820 (1963).

If the theory is not supported by the facts, they must be overlooked. This, Appellant respectfully submits, is what this Court has done.

B. Appellant Rohnert Park respectfully submits that this Court has overlooked the facts and the law of standing under Section 16, Clayton Act (15 U.S.C. 26). At the very outset, there is undisputed evidence that Rohnert Park owned, not *one* but *two* parcels of real property within the "regional commercial" area, both zoned or available for commercial uses. The second parcel is approximately 2.5 acres. See pages 35-43, Vol. I, Deposition of Peter Callinan and Exhibit B thereto, as well as the Brust Affidavit (R. 1018, 1021). One of them was a "proposed" library site, and there is nothing in this record showing whether the proposal was approved or carried out.

On these undisputed facts, this Court first states that Appellant ". . . cites no authority supporting the contention that this is a sufficient proprietary interest, and we decline [9] to so hold." (Slip Opinion, pp. 5-6). However, a ukase or fiat of this kind is not a substitute for a reasoned opinion for the guidance of the public and the litigants immediately affected.

Also, on the issue of standing, this Court, on an appeal from summary judgment, makes an unwarranted finding of fact which is not supported by any evidence in the record. Its unsupported finding is to the effect that the property owned by Rohnert Park is ". . . not *directly* affected by the location of the regional shopping center." (Slip

Opinion, p. 6, and emphasis added.) Regardless of the validity of this finding, what difference does it make if the property is directly or indirectly affected, so long as it is "affected?" The point is that the commercially zoned property is within the "target area" of the conspiracy and faces ". . . threatened loss or damage . . .." See 15 U.S.C. 26. Furthermore, no such ephemeral distinction was made in *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973), where the court states at page 131 that cities ". . . might sue to vindicate such of their own properietary interests as might be congruent with the interests of their inhabitants." (Emphasis added.) The underscored word means "in harmony," or "consistent." Webster's New Collegiate Dictionary (1959, G & C. Merriam Co.). See also the unqualified statement by the Ratcliff Re-Use Appraisal (he was retained by the Santa Rosa Appellees) that the proposed regional shopping center in Santa Rosa would "kill off any possibility of a major development in Rohnert Park . . .." Ratcliff Re-Use [10] Appraisal, p. 24, Exhibit 30 to Deposition of James K. Burns. Moreover, in July, 1975, Appellee HUD *knew* that a regional shopping center with 700,000 square feet of GLA should be able to absorb most of the needed growth of commercial space in the Santa Rosa Trade Area until about 1990. See Daugherty Deposition, Exhibit 1 at pp. 114-115 (HUD's Final Environmental Impact Statement, FEIS). This would and did threaten Rohnert Park and its specially assessed property owners with the economic loss or damage arising from the inability to compete with a federally subsidized shopping center in Santa Rosa.

In its Slip Opinion, page 7, this Court stated that ". . . Rohnert Park has not made a sufficient showing that absent the alleged antitrust violations by appellants (should be

Appellees), its commercial area would have been selected as a site for shopping center development. . . .." "Selected" by whom is not made clear by this Court. However, in its Complaint, (R. 004), Rohnert Park made the following allegations:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."

These allegations were not probed by any evidence submitted by Appellees on their motion for summary judgment. Accordingly, they must be accepted as true and raise a genuine issue of material fact. Rule 56, F.R.C.P. This Court, [11] therefore, cannot, on an appeal from a summary judgment, make a finding of fact contrary to these allegations.

Furthermore, it is clear from an earlier decision of this Court that whether Rohnert Park's municipal interests arising out of its adoption of a master plan which includes a regional shopping center, are non-economic or unquantifiable is immaterial. *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975). There, the court held that the City of Davis had standing to sue the challenged federal action (a freeway interchange) which, it was alleged, would cause it "injury in fact, economic or otherwise." Here, a general or master plan has an economic impact on the area designated by Rohnert Park for inclusions therein of a regional shopping center. See *O'Loane v. O'Rourke* (1965) 231 C.A. 2d 774, 783.

On page 5, Slip Opinion, this Court stated that Rohnert Park ". . . cites no authority supporting the contention that this (disbursing funds raised by special tax assessment for improvements in anticipation of commercial development) is a sufficient proprietary interest . . ." to support standing to bring this equitable suit for injunctive relief. Appellant does not understand this reasoning, since the Court itself cited no authority for the proposition that such a showing was insufficient to support standing to sue for equitable relief. Such a suit would render unnecessary a multiplicity of such actions by all seventeen property owners. Brust Affidavit (R. 1018). On the contrary, Appellant cited *City of Seattle v. Stirrat* (1909) [12] 55 Wash. 560, 104 Pac. 834, 836-837 (pp. 7-8, Opening Brief) and four other cases. In *City of Seattle,* the Supreme Court of Washington held that the power of a city to grade streets or lay sewers or water pipes at the expense of abutting property owners (precisely what Rohnert Park did) represents action by the city in its proprietary capacity. In so doing, it becomes a trustee, agent and representative of its specially assessed property owners, and as custodian and guardian of the collective rights of its inhabitants, has standing to bring this action for equitable relief. Rohnert Park expressly disclaimed that it brought this action as *parens patriae.* It was brought to vindicate such of its properietary interests as were and still are, congruent with those of its inhabitants in general, and more particularly, those of the property owners specially assessed to finance improvements built in anticipation of a regional shopping center in Rohnert Park. They are clearly threatened with ". . . loss or damage . . .," namely, loss of their investment. The proposed construction of the Santa Rosa regional shopping center is and continues to

be the proximate cause of the ". . . threatened loss or damage . . ." to the specially assessed property owners in Rohnert Park and the City of Rohnert Park itself.[1] [13] The concept of "proximate cause" is less constrained under Section 16 cases than those arising under Section 4 for treble damages. See *Mid-West Paper Products Co. v. Continental Group, Inc.* (C.A. 3) ..... F.2d ....., 1979—1 Trade Cases 77070. There, the Court, in finding standing to sue under Section 16, stated on pp. 77084-77085:

> "In contradistinction to § 4, § 16 does not ground injunctive relief upon a showing that 'injury' has been already sustained, but instead makes it available 'against *threatened loss or damage.*' Furthermore, § 16 does not state that the threat must be to the plaintiff's 'business or property,' and courts accordingly have held that noncommercial interests are also protected. Most significantly, however, § 16 by its terms entitles a party to injunctive relief 'when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.' Mindful of these distinctions, courts have held that for purposes of § 16 the complainant 'need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur,' and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under § 16 has been framed in terms

380

1. *Chattanooga Foundry & Pipe Works v. City of Atlanta* (1906) 203 U.S. 390, 51 L.Ed. 240, held that a municipality is a "person" within the meaning of Section 8 of the Sherman Act, the general definitional section, and therefore could maintain an antitrust action as a plaintiff. Rohnert Park, as a municipality, is similarly a "person" under Section 16, Clayton Act (15 U.S.C. 26). Cf. *City of Lafayette, La. v. Louisiana Light & Power Co.* (1978) —— U.S. ——, 46 L.W. 4265, 4267.

of a proximate cause standard that is 'less constrained' than that under § 4 and which might in fact be no more rigorous than the general rule of standing." (Citations omitted; emphasis in original.)

For all the foregoing reasons, Appellant petitions this Court for rehearing under Rule 40 and suggests the appropriateness of a hearing or rehearing in banc under Rule 35, Federal Rules of Appellate Procedure.

Dated: May 22, 1979.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By WILLIAM M. BRINTON
William M. Brinton [14]

Appendix M(2)

FILED
JUL 24 1979
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeal

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Wright has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix N

City of Rohnert Park, a municipal corporation,

Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California Corporation,

Defendants-Appellees

No. 77-1017

United States Court of Appeals,
Ninth Circuit

July 24, 1979

Plaintiff city brought action seeking to enjoin defendant city its urban renewal agency, the Department of Housing and Urban Development, and a developer from developing a regional shopping center as part of an urban renewal project, alleging that shopping center project violated federal antitrust laws and Housing Act of 1949. The United States District Court for the Northern District of California, William W. Schwarzer, J., entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) plaintiff did not have standing to sue under section of Clayton Act; (2) Housing Act of 1949 did not create private right of action to sue for violation of its provisions;

and (3) plaintiff lacked standing under Administrative Procedure Act to challenge either actions of Department of Housing and Urban Development or actions of defendant urban renewal agency.

Remanded for dismissal.

1. Commerce—62.10

Federal antitrust laws require that alleged violations have some nexus with interstate commerce in order for jurisdiction to exist. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

2. Monopolies—24(9)

Where city sought to enjoin defendants from developing regional shopping center as part of urban renewal project on ground that shopping center project violated federal antitrust laws in that construction of shopping center would discourage development of similar center in plaintiff city but where city's proprietary interest was speculative and city, as a political subdivision, could not sue as parens patriae, city failed to show interest cognizable in equity and failed to show either threat or harm proximately resulting from violation of antitrust laws and thus did not have standing to sue under section of Clayton Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

3. Monopolies—28(1.6)

To have standing under section of Clayton Act, a plaintiff must show a threatened loss or injury cognizable in equity proximately resulting from alleged antitrust violation. Clayton Act, § 16, 15 U.S.C.A. § 26.

4. Counties—208

Municipal Corporations—1016

Political subdivisions such as cities and counties whose power is derivative [2963] and not sovereign cannot sue as parens patriae, but political subdivisions may sue to vindicate such of their own proprietary interests as might be congruent with interests of their inhabitants.

5. Monopolies—24(9)

City's assertion that it acted in a proprietary capacity in raising and disbursing special assessment funds used to improve its commercial zone was not a sufficient proprietary interest to confer standing upon city under section of Clayton Act for purposes of suit to enjoin development of regional shopping center as part of an urban renewal project of other city. Clayton Act, § 16, 15 U.S.C.A. § 26.

6. Action—3

Housing Act of 1949 does not create private right of action to sue for violation of its provisions. Housing Act of 1949, § 110(c)(4) as amended 42 U.S.C.A. § 1460(c)(4).

7. Action—3

Four factors to be considered in determining whether private right of action should be implied are: whether plaintiff is one of the class for whose special benefit the statute was enacted, whether there is any indication of legislative intent to create federal right in favor of plaintiff, whether implication of such a remedy is consistent with legislative scheme, and whether cause of action is one traditionally relegated to state law.

8. Action—3

Where plaintiff city owned no land within proposed redevelopment project but sought to enjoin project on ground that defendant city sold urban renewal land, with approval of Department of Housing and Urban Development, and less than fair value in violation of Housing Act of 1949, where nothing in statute or regulations indicated legislative intent to allow private party to sue if land was sold at less than fair value, and where claim against defendant urban renewal agency was one relegated to state law, plaintiff city had no private right of action to sue under Housing Act of 1949. Housing Act of 1949, § 110(c)(4) as amended 42 U.S.C.A. § 1460(c)(4); West's Ann. Cal. Health & Safety Code, §§ 33433, 33503.

9. Municipal Corporation—1017

Section of Administrative Procedure Act providing that person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within meaning of relevant statute is entitled to judicial review thereon did not create right of action against city urban renewal agency, because agency was not an "authority of the government of the United States." 5 U.S.C.A. §§ 701(b)(1), 702; U.S.C.A. Const. art. 3, § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Civil Procedure—103

Where city brought action to enjoin defendants from developing regional shopping center as part of urban renewal project, where plaintiff city alleged that defendant city sold urban renewal land, with approval of Department

of Housing and Urban Development, at less than fair value in violation of Housing Act of 1949, where injury asserted by plaintiff city was potential, not actual, and where allegedly illegal agency action was failure to comply with regulations governing appraisal, relationship between injury asserted and alleged illegal agency action was so attenuated it failed to meet minimum article III requirements, and plaintiff city therefore lacked standing to sue under Administrative Procedure Act. 5 U.S.C.A. §§ 701(b)(1), 702; U.S.C.A.Const. art. 3, § 1 et seq.

Appeal from the United States District Court for the Northern District of California.

Before WRIGHT and KILKENNY, Circuit Judges, and PFAELZER,* District Judge.

EUGENE A. WRIGHT, Circuit Judge:

The court's opinion of May 9, 1979 has been withdrawn. The appellant's petition for rehearing and suggestion for rehearing en banc have been denied. The following replaces the court's earlier disposition.

The City of Rohnert Park sought to enjoin the appellees, City of Santa Rosa, the Urban Renewal Agency of Santa Rosa (Agency), the Department of Housing and Urban Development (HUD), and Ernest W. Hahn, Inc. from developing a regional shopping center as part of an urban renewal project. Rohnert Park asserted that the shopping center project violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (West Supp.1978), as a restraint of trade and as the product of an alleged conspiracy or attempt to monopolize retail merchandise space in the Santa Rosa trade area. The plaintiff also alleged that Santa Rosa sold the urban renewal land, with HUD approval, at less than

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*Of the Central District of California.

fair value in violation of the Housing and Development Act of 1965, 42 U.S.C. § 1460(c)(4) (1969).

Upon the appellees' motions for summary judgment, the district court found that Rohnert Park had failed to substantiate its antitrust allegations. Rohnert Park appeals.

FACTS

Rohnert Park and Santa Rosa, located within seven miles of one another, each wanted to develop a regional shopping center. Rohnert Park's master plan, adopted in 1966, designated areas within its boundaries as a commercial zone. The facilities proposed for the zone included a regional shopping center. The city owns two parcels within the commercial zone. Through the use of special assessment funds, it has improved the zone to render it suitable for development.

Santa Rosa's regional shopping center plan is part of an urban renewal and redevelopment project in the downtown area. The original urban renewal site, developed pursuant to the California Community Redevelopment Law, Cal. Health & Safety Code § 33000, *et seq.* (West 1973), was expanded after an earthquake created additional blighted land in need of redevelopment.

Hahn was selected to develop the project. A tentative agreement entered into by the Agency and Hahn prescribed the terms of sale and conditions of development. In consideration for the site, Hahn agreed to pay $2 million, to construct and maintain parking facilities at its expense, and to make them available to the public.

Following the Agency's tentative agreement with Hahn, this suit was filed [2965] together with others, including

a validating proceeding brought by Codding Enterprises[1] in state court. *See Codding Enterprises, et al. v. Urban Renewal Agency of the City of Santa Rosa, et al.,* Nos. 79465, 79762, 81799, 84237 (Sonoma County Superior Court, unpublished opinion filed Dec. 7, 1976), *rev'd and remanded in part,* 1 Civil 41188 (Ct.App., unpublished opinion filed Apr. 26, 1978), *hearing denied,* (Sup.Ct., June 28, 1978).[2] In the validating proceeding, the superior court held, *inter alia,* that there were no state antitrust violations and that the sale price set forth in the tentative agreement was fair and equitable and not in violation of 42 U.S.C. § 1460(c)(4). That holding was not disturbed on review by the state court of appeals.

THE ANTITRUST VIOLATIONS

[1] In this suit, Rohnert Park alleges that the appellees engaged "in a scheme to develop a regional shopping center" in violation of federal antitrust laws.[3] The district court granted summary judgment for the appellees on the

1. Codding Enterprises, a developer based in Rohnert Park, owns shopping centers in the area. It also owns much of the land in Rohnert Park which was to be part of the proposed Rohnert Park shopping center.

2. Other related actions include an earlier suit by Codding Enterprises, *Codding Enterprises v. Urban Renewal Agency of the City of Santa Rosa,* 1 Civil 36299 (Ct.App. unpublished opinion filed Oct. 23, 1975), and cross suits by Hahn and Codding Enterprises against one another for antitrust violations, *Ernest W. Hahn, Inc. v. Codding,* 423 F.Supp. 913 (N.D.Cal. 1976).

3. The federal antitrust laws require that the alleged violations have some nexus with interstate commerce in order for jurisdiction to exist. The district court assumed that it had jurisdiction, finding a sufficient nexus with interstate commerce. Its position is supported by *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). We assume, without deciding, that if Rohnert Park could establish that antitrust violations occurred, the effects on interstate commerce would be sufficient to confer jurisdiction.

ground that the plaintiff failed to show material facts from which a trier of fact could find ongoing violations of the antitrust laws.

[2] We need not reach the question whether summary judgment was appropriate on that ground. We conclude, instead, that the district court should have dismissed the action because Rohnert Park lacked standing.

Rohnert Park did not seek damages for the alleged antitrust violations. It sought only injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (West Supp.1978). That section provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . .

In *State of Hawaii v. Standard Oil Company of California,* 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), we noted that the standing requirements under § 16 of the Clayton Act are broader than those under § 4 of the Act, which provides for recovery of treble damages only by a party injured in his [2966] business or property by reason of an antitrust violation. 15 U.S.C. § 15 (1973).

[3] To have standing under § 16, a plaintiff must show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *Buckley Towers Condominium, Inc. v. Buchwald,* 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 571 (1977); *In Re Multidistrict Vehicle*

Air Pollution M. D. L. No. 31, 481 F.2d 122, 130 (9th Cir.), *cert. denied, Morgan v. Automobile Mfgrs. Ass'n,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973).[4]

Rohnert Park alleges that if a regional shopping center is constructed as part of the Santa Rosa urban renewal project, it will discourage the development of a similar center in Rohnert Park. Relying upon *In Re Multidistrict,* 481 F.2d at 130-31, it argues that this threatens injury to interests cognizable in equity, for which it is entitled to § 16 relief.

In *In Re Multidistrict* we discussed two types of interests which can confer § 16 standing upon a state: the interests of citizens asserted by the state as *parens patriae* and the state's own proprietary interests. We found that plaintiff states had standing as *parens patriae* to seek equitable relief under § 16 in a suit alleging a conspiracy by the automobile industry to suppress antipollution technology.

[4] Rohnert Park essentially asserts standing here as *parens patriae* on behalf of its property owners, taxpayers, and inhabitants who might be injured by the loss of investment profits and tax revenues if the center is not built in Rohnert Park. Its argument fails because "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae, . . .*" *In Re Multidistrict,* 481 F.2d at 131.

[5] Political subdivisions may, however, "sue to vindicate such of their own proprietary interests as might be

4. One court concluded:
> [i]t is apparent from the language of § 16 that the applicable standing rules in suits to enjoin antitrust violations are the general rules of standing. The plaintiff need show only that he is threatened by injury proximately caused by the defendant.

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976) (footnotes omitted).

congruent with the interests of their inhabitants." *Id.* Rohnert Park asserts two such proprietary interests. First, it contends that it acted in a proprietary capacity in raising and disbursing the special assessment funds used to improve the commercial zone. It cites no authority supporting the contention that this is a sufficient proprietary interest under § 16, and we decline to so hold.[5] [2967]

Second, Rohnert Park argues that as the owner of property within the commercial zone, it possesses the requisite proprietary interests. Part of that property, however, is designated as a library site and the remainder had been set aside for expansion of a waste water facility. It is not clear from the record whether any of this land will be available for commercial use or whether its value will be affected by the location of the regional shopping center.

Because it cannot assert the interests of its citizens, and its own proprietary interest is speculative, Rohnert Park fails to show an interest cognizable in equity, the first requirement for standing under § 16. Even if it could establish such an interest, it fails to meet the second requirement

5. Appellant cites *City of Seattle v. Stirrat,* 55 Wash. 560, 104 P. 834, 836-37 (1909), for the proposition that the city had standing to sue as a trustee or agent for its specially assessed property owners and that it has a proprietary interest because it acted in its proprietary capacity in carrying out the improvements paid for by the special assessments.

In *Stirrat,* the city sued a contractor for money due in connection with work on local improvements. The contractor defended that it had paid the money to the city comptroller, who had absconded with it. The court held that the comptroller's act was ultra vires, but that the city, as trustee of the assessment fund, was estopped from denying the comptroller's authority.

No one asserts that Rohnert Park may not similarly sue contractors with whom it does business on behalf of its specially assessed residents. Here, however, it attempts to sue a local redevelopment agency, a federal agency, and a contractor with whom it and its residents have no contractual relationship. *Stirrat* provides no support.

for § 16 standing. It has shown neither threat nor harm proximately resulting from a violation of the antitrust laws.

Although antitrust violations were not involved in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that case presents an analgous situation. The question there was whether citizens of one town had standing to complain of the zoning practices of a neighboring town which tended to discourage the development of low income and minority residences. The Court stated that . . . .

> [p]etitioners here . . . rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

Warth v. Seldin, 422 U.S. at 507, 95 S.Ct. at 2209-10.

Given the trade area, as Rohnert Park defined it, and the limited demand for new retail shopping center space in the area, any competition, whether or not it violates the antitrust laws, might have similar adverse effects on the city's commercial development. Furthermore, Rohnert Park has not made a sufficient showing that, absent the alleged antitrust violations by appellees, its commercial area would have been selected as a site for shopping center development. As in *Warth,* the question whether these appellants would have benefited but for appellees' actions is entirely speculative. They have not demonstrated potential injury which confers standing to sue under § 16.

THE HOUSING ACT

Rohnert Park alleges that the Agency violated 42 U.S.C. § 1460(c)(4) (1976) and HUD regulations by selling the shopping center land to Hahn at less than fair market value,

and that HUD violated the statute and regulations by approving the sale. The city asserts standing under the Housing Act and the Administrative Procedure Act (APR).

We hold that the Housing Act does not create a private right of action to sue for violation of its provisions and that Rohnert Park lacks standing under the APA to challenge either HUD's or the Agency's actions.

Private Right of Action.

[6] The Housing Act defines an "urban renewal project" as [2968]

> undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight.
>
> * * * * *

42 U.S.C. § 1460(c) (1976). Those undertakings include "disposition of any property acquired in the urban renewal area . . . at its fair value for uses in accordance with the urban renewal plan . . .." *Id.* at § 1460(c)(4). HUD's Urban Renewal Handbook 7214.1, ch. 3 (Rev. 1974) outlines procedures for establishing "fair reuse value."

Because the Housing Act does not expressly provide that private persons may sue to enforce its terms, Rohnert Park may not sue under the act unless there is an implied right of action for such suits.

> [I]t is only if such a right of action exists that we need consider whether the [appellant] had standing to bring the action . . ..

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 456, 94 S.Ct. 690, 692, 38 L.Ed.2d 646 (1974).

[7] In *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Court set forth four factors to be considered in determining whether a private right of action should be implied. They are (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted" 422 U.S. at 78, 95 S.Ct. at 2088 (citations omitted); (2) whether there is any indication of legislative intent to create a federal right in favor of the plaintiff; (3) whether implication of such a remedy is consistent with the legislative scheme; and (4) whether the cause of action is one "traditionally relegated to state law." *Id.* (citations omitted). *Cf. Keaukaha-Panaewa Community v. Hawaiian Homes Com'n,* 588 F.2d 1216, 1222 (9th Cir. 1978) *petition for cert. filed,* 47 U.S.L.W. 3684 (Apr. 17, 1979).

The Sixth Circuit Court of Appeals has recently analyzed the Housing Act and the Urban Renewal Handbook under the four-part *Cort* test. *M. B. Guran Co., Inc. v. City of Akron,* 546 F.2d 201 (6th Cir. 1976). It concluded that regulations enacted pursuant to the statute did not create an implied private right of action for a disappointed contractor to challenge a local agency's failure to comply with competitive bidding guidelines.[6]

In applying the test, the court first noted that the central purpose of the Housing Act is "'the elimination of substandard and other inadequate housing through the clear-

6. In *Cedar-Riverside Associates, Inc. v. United States,* 459 F.Supp. 1290, (D.Minn.1978), the district court held that there was no implied private right of action which would allow private developers to sue a local redevelopment agency, the city of Minneapolis, the Secretary of HUD, and others for violation of the Housing Act.

The court followed *M. B. Guran,* in reasoning that plaintiffs, who did not reside within the urban renewal project and were not parties to contracts with the Agency, were not among those for whose "especial benefit the statute was enacted." [2969]

ance of slums and blighted areas, . . .,'" quoting 42 U.S.C. § 1441. It concluded that "the class for 'whose *especial* benefit the statute was enacted' must be the persons who inhabit inadequate housing." 546 F.2d at 204.

It next found "no indication of legislative intent to create the remedy sought," either in the statutory language or in the Handbook provisions, and stated:

> insofar as the existence of a private cause of action would lead to numerous suits against the local authority, the construction of urban projects would be delayed and the underlying purposes of the legislative scheme would be thwarted. Cf. *Gibson & Perin Co. v. Cincinnati,* 480 F.2d 936, 942 (6th Cir.), cert. denied, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973).[7]

Id. at 205.

Finally, it found that challenges to the "alleged arbitrary action of a state government" were "traditionally relegated to state law." *Id.*

7. In *Gibson & Perin Co.,* plaintiff businesses who were not located within an urban renewal project sued the city and the local agency, alleging deficiencies in design of a parking garage within the project. They did not sue under the Housing Act, but instead

> charged the defendants with violation of their civil rights, conspiracy, fraud, violation of federal and state antitrust laws, and with everything else that they could think of including the charge of depriving them of due process of law and the equal protection of the laws.

480 F.2d at 939.

Although this was not a Housing Act case, the policy considerations addressed by the court are relevant here:

> In our case no review was provided by statute of acts of agencies and private developers of Urban Renewal projects. We think it was because review would frustrate implementation of Urban Renewal plans and would discourage cities and redevelopers who might not want to become embroiled in protracted litigation, particularly after they had expended their money to participate in the project.

Id. at 942. [2970]

[8] Much of the court's reasoning applies here. Given the purpose of the Housing Act, it is difficult to conclude that an adjacent city which owns no land within the redevelopment project is among the class for whose especial benefit the statute was enacted.

Although there is statutory language which requires that urban renewal land be sold at fair value, nothing in the statute or the regulations indicates legislative intent to allow private parties to sue if the land is sold at less than fair value. HUD must approve the appraisals when urban renewal property is sold. The regulatory scheme provides for HUD oversight, not private action, to enforce agency compliance with the fair price provisions. *Cf. Berry v. Housing and Home Finance Agency,* 340 F.2d 939, 940 (2d Cir. 1965); *Johnson v. Redevelopment Agency of the City of Oakland, Cal.,* 317 F.2d 872, 874 (9th Cir. 1963).

Here, as in *M. B. Guran,* the existence of a private cause of action would thwart the underlying purposes of the legislative scheme by encouraging litigation which would delay the construction of urban renewal projects.

Finally, Rohnert Park's claim against the Agency is one "relegated to state law." California provides for a validating proceeding in which interested parties may assert challenges to actions of urban renewal agencies. Cal. Health & Safety Code § 33501 (West 1973). The precise question of the validity of the Agency's determination of fair reuse value and its compliance with HUD regulations was decided adversely to Rohnert Park's position in the state validating proceedings prosecuted simultaneously with this action. *Codding Enterprises v. Urban Renewal Agency of Santa Rosa,* Nos. 79465, 79762, 81799, 84237 (Sonoma County Superior Court, unpublished opinion, filed Dec. 7, 1976), *rev'd and remanded in part on other grounds,* 1 Civil 41188 (Ct.

App., unpublished opinion filed Apr. 26, 1978) *hearing denied,* (Sup. Ct., June 28, 1978).[8]

All four *Cort* criteria militate against implying a cause of action to sue the Agency for violating the Housing Act. Although the fourth criterion does not support a similar conclusion as to HUD, we hold nevertheless that Rohnert Park has no private right of action to sue HUD under the

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8. The state court reached the following conclusions of law:

3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record.

4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the redevelopment project area for not less than its fair value for uses in accordance with the redevelopment plan.

According to California Health & Safety Code § 33503 (West 1973), the determination in the validating proceeding precludes relitigation of the same issue. Under this provision, even though Rohnert Park was not a party to the validating proceeding, it would be barred from relitigating the fairness of the site sale price in state court. *See City of Ontario v. Superior Court,* 2 Cal.3d 335, 341, 85 Cal.Rptr. 149, 466 P.2d 693 (1970) (interested party must bring validating proceeding within time and manner specified by Cal.Civ.Pro. § 860 (West Supp.1978) or be forever barred from contesting the validity of agency action in a court of law).

Although we do not rest our decision on this ground, we note that the Supreme Court recently decided that entities which finance and control state litigation may be collaterally estopped in federal court from relitigating issues decided in the state action, even though they were not parties in state court. *Montana v. United States,* —— U.S. ——, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Here, the *Montana* facts are reversed: Codding Enterprises was a party in state court and has financed this litigation by Rohnert Park through contributions to the city's Chamber of Commerce. Deposition of Peter Callinan, Record at 917-20. [2971]

act. It has an adequate remedy against HUD under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), if it can meet the standing requirements of that section.

The Administrative Procedure Act.

The Administrative Procedure Act provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702 (1976).

[9, 10] We note at the outset that this provision does not create a right of action against the Agency because it is not an "authority of the Government of the United States" 5 U.S.C. § 701(b)(1) (1976). *See also Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 936, 941 (6th Cir. 1973). HUD clearly is an "agency" within the statutory definition, therefore the relevant question is whether Rohnert Park has standing under § 702.

The city relies upon *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), in which plaintiffs asserted standing under § 702 to challenge a ruling by the Comptroller of the Currency, based upon their status as competitors of national banks. The case established that plaintiffs seeking standing under § 702 must meet the minimum constitutional requirements of Article III. "The first question," according to the Court, "is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 397 U.S. at 152, 90 S.Ct. at 829.

A more recent case involving § 702 sheds more light upon the injury-in-fact requirement. In *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), the Court explained:

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing exercise of its power by a federal court would be gratutitous and thus inconsistent with the Art. III limitation.

426 U.S. at 38, 96 S.Ct. at 1924 (footnote omitted). It continued:

> [I]ndirectness of injury, while not necessarily fatal to standing, "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."

426 U.S. at 44-45, 96 S.Ct. at 1927, *quoting Warth v. Seldin,* 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The injury asserted by Rohnert Park is potential, not actual: reduction in value of its property and that of its residents, and reduction in future tax revenues because of the inhibiting effect of the Santa Rosa project upon its commercial development.

The allegedly illegal agency action is failure to comply with the regulations set forth in the Urban Renewal Handbook 7214.1, Ch. 3 (Rev. 1974). Those regulations provide that when urban renewal land with a fair reuse value in excess of $25,000 is sold, HUD must obtain and review two appraisals of the land. One must be by an independent appraiser, but the other may be by "a competent Agency staff appraiser." *Id.* at 9.

In affidavits submitted in support of its motion for summary judgment, HUD asserted that it obtained three appraisals between 1970 and 1972; that they were reviewed by David L. Lane, an independent appraiser, in 1973; that Lane did an updated appraisal in 1975 which established a value of $1,829,520 for the property; and that Leevern Johnson, a HUD Realty Specialist, reviewed all these appraisals and found them "in accordance with HUD requirements." Rohnert Park asks us to "hold unlawful and set aside"[9] the sale of the Agency property because Johnson and Lane failed to consider all factors that Rohnert Park deems relevant in determining the fair reuse value of the land.[10]

Although potential injury may be sufficient to confer standing, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), the relationship between

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9. It cites 5 U.S.C. § 706, dealing with scope of review of agency action:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) . . .;
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

5 U.S.C. § 706(1)(A)(1976). [2972]

10. Although it does not do so clearly, Rohnert Park also seems to argue that it is "aggrieved . . . within the meaning of a relevant statute" because HUD and the Agency's actions were part of a conspiracy to violate the antitrust laws.

We have held that the city lacks standing under § 16 of the Clayton Act to raise its antitrust claims and it may not do so indirectly by means of the APA.

the injury here and the alleged illegal agency action is too attenuated to meet the minimum Article III requirement.

Assuming we were to grant the requested relief, we would have to remand to the district court for a determination of fair reuse value in accordance with the regulations.[11] Assuming that determination resulted in a higher fair reuse value, the sale to Hahn could be declared void. Presumably, Hahn and the Agency would then be free to negotiate a sale based on the higher fair reuse value.

Several additional links in the chain of speculation are necessary, however, before we arrive at the point where Rohnert Park would be able to reap the benefits of commercial development within its boundaries. We would have to assume:

> (1) that Hahn and the Agency would be unable to renegotiate a sale of the property;
>
> (2) that their failure to consummate a sale would halt the Santa Rosa project or somehow limit its scope;
>
> (3) that businesses now slated for the Santa Rosa shopping center would then choose to locate in Rohnert Park; and
>
> (4) that financing would be available to fund an appropriate commercial development in Rohnert Park.

Rohnert Park has failed to show that the prospective injury to its proprietary interest "is likely to be reduced by a favorable decision." The scenario that would avert the injury is too "conjectural" and "hypothetical." *See O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674

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11. Were we to remand for further factfinding on the fair price issue, the district court in its discretion could decide to remand to HUD for proceedings in accordance with its specific instructions.

(1974).[12] Accordingly, we hold that the city lacks standing to sue under the APA because it fails to meet the fundamental constitutional requirement of injury in fact.

We remand for dismissal in accordance with this opinion.

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12. In *O'Shea*, the Court stated:
[a]bstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Golden v. Zwickler*, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941); *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-565, 91 L.Ed. 754 (1947).

414 U.S. at 494, 94 S.Ct. at 675. [2973]

Appendix O(1)

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,

Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,

Defendants-Appellees.

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35, FEDERAL RULES OF APPELLATE PROCEDURE

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SUBJECT INDEX

	Page
Introduction	1
The Points of Law and Fact Which This Court Has Overlooked or Misapprehended	
A	2
B	5
C	11

TABLE OF AUTHORITIES CITED

Atwater v. Roudebush (D.C. Illinois) 452 F.Supp. 622 (1976)	5
City of Davis v. Coleman (C.A. 9) 521 F.2d 661 (1975)	8
City of Seattle v. Stirrat (1909) 55 Wash. 560, 104 Pac. 834	9
Denton v. Mr. Swiss of Missouri, Inc. (C.A. 8) 564 F.2d 236 (1977)	5
Mid-West Paper Products Co. v. Continental Group, Inc. (C.A. 3) ..... F.2d ....., 1979—1 Trade Cases 77070	10
O'Loane v. O'Rourke (1965) 231 C.A.2d 774	8
State of California v. Automobile Mfgrs. Assn. (C.A. 9) 481 F.2d 122 (1973)	2, 6

Rules

Federal Rules of Appellate Procedure	
Rule 35	1, 2, 12
Rule 40	1, 2, 12
Federal Rules of Civil Procedure	
Rule 56	3, 8
Rule 56(c)	4[i.]

Constitutions

U.S. Constitution, Amendment V	3

Statutes

	Page
Administrative Procedure Act	3
5 U.S.C. Sec. 702	5
Clayton Act (15 U.S.C. 26)	6
Section 4	10
Section 16	5, 10
National Housing Act	11, 12
42 U.S.C. 3532(b)	11

Miscellaneous

Webster's New Collegiate Dictionary (1959, G. & C. Merriam Co.)	6[ii.]

In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.[1]

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35, FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTION

On *May 9, 1979*, this Court filed its *first* typewritten opinion in this case. At the conclusion of this opinion this Court said, "We remand to the District Court for dismissal in accordance with this opinion" (p. 10).

On *May 22, 1979*, Appellant filed its Petition for rehearing, and for a hearing in banc under Rules 35 and 40 of Federal Rules of Appellate Procedure.

On July 24, 1979, this Court having *with good reason* changed its mind regarding the validity of some of the reasons on which it supported its judgment of dismissal

1. Originally, and until July 24, 1979, the action was captioned in the Records of this Court as *City of Rohnert Park, a municipal corporation, Plaintiff-Appellant v. James T. Lynn, as Secretary of the United States, Department of Housing and Urban Development, et al., Defendants-Appellees.* [1]

denied appellant's petition; withdrew its first opinion and wrote a second opinion with which it has replaced the first (Second Opinion, p. 1). In this opinion the Court again concluded by saying, "We remand for dismissal in accordance with this opinion" (Second Opinion, p. 14).

Pursuant to Rule 40 of said Rules of Appellate Procedure, Appellant hereby again petitions this Court for a rehearing of its appeal. Hereinafter Appellant sets forth the points of law and fact which in its opinion this Court has overlooked or misapprehended.

Pursuant to Rule 35 of said Rules, Appellant also petitions for and suggests the appropriateness of rehearing in banc to secure and maintain uniformity of its decisions. In this connection appellant submits this Court's decision herein on the issue of "standing" conflicts sharply with its decision in *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973).

THE POINTS OF LAW AND FACT WHICH THIS COURT HAS OVERLOOKED OR MISAPPREHENDED

A. By its Second Opinion of July 24, 1979, this Court has deprived Appellant of its Constitutional right to procedural due [2] process (U.S. Constitution, Amendment V). This it has done by departing from the settled course of judicial proceedings as established by law (Rule 56 of Federal Rules of Civil Procedure). The Court departed from the settled course of judicial proceedings when it denied Appellant relief under the Administrative Procedure Act on the ground that the relationship between Appellant's injury and Hud's illegal action in consenting to a sale of land for a price below its fair reuse value is *too attenuated* "to meet the minimum Article III requirement" (Second Opinion, p. 13). The reasoning whereby the

Court arrived at this conclusion is set forth at pages 11 to 14 of its Second Opinion.

The illegality of the Court's action and the invalidity of its reasoning becomes apparent when one considers that the judgment in the Court below was entered pursuant to Appellees' motions for summary judgment and that during that proceeding *the reality of Appellant's injury was not questioned.* Moreover, the Appellees did not in that proceeding raise the issue whether the prospective injury to Appellant's proprietary interest would or would not be "reduced by a favorable decision." Had these issues and questions been raised by Appellees during the proceeding, Appellant would have been given *notice* thereof, a *hearing* and an opportunity to produce admissible evidence demonstrating that there was a genuine issue of material fact regarding the reality of its injury (Rule 56 of Federal Rules of Court Procedure). [3]

Here, this Court in the role of a protagonist has, without notice to Appellant, and without supporting admissible evidence, determined that Appellant's injury was too conjectural to merit relief.

To bolster its unsupported conclusion the Court argues that before it could arrive at the point where Appellant would be able to reap "the benefits of commercial development within its boundaries" it would have to make a number of assumptions including one to the effect "that financing would be available to fund an appropriate commercial development in Rohnert Park." However, no such assumption is necessary because Appellant in its Complaint (R. 004) made the following allegations:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. *There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."*[2]

These allegations were not probed by any evidence submitted by Appellees on their motion for summary judgment. Accordingly, they must be accepted as true and raise a genuine issue of material fact. Rule 56(c), F.R.C.P. This Court, therefore, cannot, on appeal from summary judgment make a finding contrary to these allegations.[3]

In any event this Court has decided the issue of the reality of Appellant's injury against it without evidence, without notice and without a hearing. Accordingly, this Court has deprived Appellant of its constitutional right to due process [*Denton v. Mr. Swiss of Missouri, Inc.* (C.A. 8) 564 F.2d 236, 239 (1977); *Atwater v. Roudebush* (D.C. Illinois) 452 F.Supp. 622, 626-627 (1976)]. This being so, the Court should grant a rehearing and rule that Appellant is entitled to seek relief under the terms of the Administrative Procedure Act (5 U.S.C. Sec. 702).

B. Appellant Rohnert Park respectfully submits that this Court has overlooked the facts and the law of standing under Section 16, Clayton Act (15 U.S.C. 26). At the very outset, there is undisputed evidence that Rohnert Park owned *two* parcels of real property within the "regional commercial" area, both zoned or available for commercial uses. See pages 35-43, Vol. I, Deposition of Peter Callinan and Exhibit B thereto, as well as the Brust Affidavit (R. 1018, 1021). One of them was a "proposed" library site, and there is nothing in this record showing whether the pro-

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2. All emphasis added to quoted material is supplied by us, unless otherwise indicated.

3. These matters were called to the attention of the Court at pp. 11-12 of our first petition for a rehearing. [4]

posal was approved or carried out. Moreover, the record shows without conflict that Appellant has in its *proprietary capacity* raised and disbursed the funds required to improve its commercial zone.

On these undisputed facts, this Court first states that Appellant ". . . cites no authority supporting the contention that this is a sufficient proprietary interest, and we decline [5] to so hold." (Second Opinion, pp. 5-6). However, a ukase or fiat of this kind is not a substitute for a reasoned opinion for the guidance of the public and the litigants immediately affected.

Pursuing further the matter of standing the Court argues that it is *not clear* from the record whether any Appellant land will be available for commercial use or "whether its value will be affected by the location of the regional shopping center." (Second Opinion, p. 6.) This is irrelevant.[4] The point is that all the commercially zoned property, including Appellant's, is within the "target area" of the conspiracy and faces ". . . threatened loss or damage. . . ." See 15 U.S.C. 26. Furthermore, no such ephemeral distinction was made in *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973), where the court states at page 131 that cities ". . . might sue to vindicate such of their own proprietary interests as might be *congruent* with the interests of their inhabitants." The underscored word means "in harmony," or "consistent." Webster's New Collegiate Dictionary (1959, G & C. Merriman Co.). See also the unqualified statement in Ratcliff Re-Use Appraisal (he was retained by the Santa Rosa Appellees) that the proposed regional

4. On motion for summary judgment the evidence always is construed in favor of the party opposing the motion and he *is given the benefit of all favorable inferences* that can be drawn from it. (Wright & Miller, Federal Procedure; Civil Sec. 2727, pp. 526-528). [6]

shopping center in Santa Rosa would "kill off any possibility of a major development in Rohnert Park. . . ." Ratcliff Re-Use Appraisal, p. 24, Exhibit 30 to Deposition of James K. Burns. Moreover, in July, 1975, Appellee HUD *knew* that a regional shopping center with 700,000 square feet of GLA should be able to absorb most of the needed growth of commercial space in the Santa Rosa Trade Area until about 1990. See Daugherty Deposition, Exhibit 1 at pp. 114-115 (HUD's Final Environmental Impact Statement, FEIS). This would and did threaten Rohnert Park and its specially assessed property owners with the economic loss or damage arising from the inability to compete with a federally subsidized shopping center in Santa Rosa.

In its Second Opinion, page 7, this Court states that ". . . Rohnert Park has not made a sufficient showing that absent the alleged antitrust violations by Appellees, its commercial area would have been selected as a site for shopping center development. . . ." "Selected" by whom is not made clear by this Court. However, in its Complaint, (R. 004), Rohnert Park made the following allegations:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."[5]

These allegations were not probed by any evidence submitted by Appellees on their motion for summary judgment. Accordingly, they must be accepted as true and raise a genuine issue of material fact. Rule 56, F.R.C.P. This

5. This allegation is also discussed at page 4 of this Petition. [7]

Court, therefore, cannot, on an appeal from a summary judgment, make a finding of fact contrary to these allegations.

Furthermore, it is clear from an earlier decision of this Court that whether Rohnert Park's municipal interests arising out of its adoption of a master plan which includes a regional shopping center, are non-economic or unquantifiable is immaterial. *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975). There, the court held that the City of Davis had standing to sue the challenged federal action (a freeway interchange) which, it was alleged, would cause it "injury in fact, economic or otherwise." Here, a general or master plan has an economic impact on the area designated by Rohnert Park for inclusions therein of a regional shopping center. See *O'Loane v. O'Rourke* (1965) 231 C.A.2d 774, 783.

On pages 5 and 6 of its Second Opinion, this Court states that Rohnert Park ". . . cites no authority supporting the contention that this (disbursing funds raised by special tax assessment for improvements in anticipation of commercial development) is a sufficient proprietary interest . . ." to support standing to bring this equitable suit for injunctive relief. Appellant does not understand this reasoning, since the Court [8] itself cited no authority for the proposition that such a showing was insufficient to support standing to sue for equitable relief. Such a suit would render unnecessary a multiplicity of such actions by all seventeen property owners. Brust Affidavit (R. 1018). On the contrary, Appellant cited *City of Seattle v. Stirrat* (1909) 55 Wash. 560. 104 Pac. 834, 836-837 (pp. 7-8, Opening Brief) and four other cases. In *City of Seattle*, the Supreme Court of Washington held that the power of a city to grade streets or lay sewers or water pipes at the expense of abutting property owners (precisely what Rohnert Park did) represents action by the city in its proprietary capacity. In so doing, it becomes a trustee, agent and representative of its specially assessed property owners, and as custodian and guardian of the collective rights of its inhabitants, has standing to bring this action for equitable relief. Rohnert Park expressly disclaimed that it brought this action as *parens patriae*. It was brought to vindicate such of its proprietary interests as were and still are, congruent with those of its inhabitants in general, and more particularly those of the property owners specially assessed to finance improvements built in anticipation of a regional shopping center in Rohnert Park. They are clearly threatened with ". . . loss or damage . . . ," namely, loss of their investment. The proposed construction of the Santa Rosa regional shopping center is and continues to be the proximate cause of [9] the ". . . threatened loss or damage . . ." to the specially assessed property owners in Rohnert Park and the City of Rohnert Park itself.[6] The concept of "proximate cause" is less constrained under Section 16 cases than those arising under Section 4 for treble damages. See *Mid-West Paper Products Co. v. Continental Group, Inc.* (C.A. 3) ..... F.2d ....., 1979 - 1 Trade Cases 77070. There, the Court, in finding standing to sue under Section 16, stated on pp. 77084-77085:

> "In contradistinction to § 4, § 16 does not ground injunctive relief upon a showing that 'injury' has been already sustained, but instead makes it available

6. *Chattanooga Foundry & Pipe Works v. City of Atlanta* (1906) 203 U.S. 390, 51 L.Ed. 240, held that a municipality is a "person" within the meaning of Section 8 of the Sherman Act, the general definitional section, and therefore could maintain an antitrust action as a plaintiff. Rohnert Park, as a municipality, is similarly a "person" under Section 16, Clayton Act (15 U.S.C. 26). Cf. *City of Lafayette, La. v. Louisiana Light & Power Co.* (1978) ..... U.S. ....., 46 L.W. 4265, 4267. [10]

'against *threatened loss or damage.*' Furthermore, § 16 does not state that the threat must be to the plaintiff's business or property,' and courts accordingly have held that noncommercial interests are also protected. Most significantly, however, § 16 by its terms entitles a party to injunctive relief 'when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.' Mindful of these distinctions, courts have held that for purposes of § 16 the complainant 'need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur,' and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under § 16 has been framed in terms of a proximate cause standard that is 'less constrained' than that under § 4 and which might in fact be no more rigorous than the general rule of standing." (Citations omitted; emphasis in original.)

C. At pages 7-11 of its Second Opinion the Court considers the question whether Appellant or some similarly situated has an implied right of action against HUD in the event it violates the provisions of the Housing Act, and concludes that no such right exists. It reaches this conclusion on the basis that the Housing Act was not enacted *for the benefit of Appellant and its property owners* (Second Opinion, pp. 9-11). In testing the validity of this conclusion it should be borne in mind that we are not dealing here with urban *housing*, but with urban *commercial* development, and that Appellant's property owners are *private entrepreneurs,* who are not aided by governmental subsidies.

With this in mind we advert to the fact that it is HUD's statutory duty to "*encourage private enterprise* to serve

as large a part of the nation's total . . . urban development needs as it can and develop the fullest cooperation with *private enterprise* in achieving the objectives of the Department." (42 U.S.C. 3532(b).) Accordingly, it must be conceded that the Housing Act was enacted for the benefit of entrepreneurs such as Appellant's property owners. Moreover, in the context of this case, it is obvious that HUD's statutory objectives cannot be achieved if it is permitted to subsidize Appellee [11] Hahn while it competes unfairly with these property owners.

On the basis of the foregoing we submit that this Court in ruling that the Housing Act does not afford Appellant and its property owners a right of action, it has entirely overlooked and misapprehended the law and facts involved in this appeal.

For all the foregoing reasons, Appellant petitions this Court for a rehearing under Rule 40 and suggests the appropriateness of a hearing or rehearing in banc under Rule 35, Federal Rules of Appellate Procedure.

Dated: August 6, 1979.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By RICARDO J. HECHT [12]

Appendix O(2)

Filed Oct 26 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing, Judge Wright has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix P(1)

In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR JUDGMENT OF CIVIL CONTEMPT UPON DEFENDANTS-APPELLEES PURSUANT TO RULE 27, FEDERAL RULES OF APPELLATE PROCEDURE

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In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR JUDGMENT OF CIVIL CONTEMPT UPON DEFENDANTS-APPELLEES PURSUANT TO RULE 27, FEDERAL RULES OF APPELLATE PROCEDURE

Plaintiff-Appellant hereby respectfully moves this Honorable Court for a Judgment of Civil Contempt against Defendants-Appellees and as grounds therefor shows:

I By its complaint filed in the United States District Court Appellant sought to *enjoin* the Appellees from developing a regional shopping center as part of an urban renewal project. Appellant alleged that the shopping center project violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, as [1] a restraint of trade, and as the product of a conspiracy or attempt to monopolize retail merchandise space in the Santa Rosa trade area. Appellant also alleged that the Santa Rosa Appellees (City of Santa Rosa and Urban Renewal Agency) in furtherance of the

conspiracy, entered into a contract, with the approval of Appellee HUD, to sell the urban renewal land on which the shopping center was to be constructed to Appellee Hahn, a land developer, at less than its fair value in violation of the Housing and Development Act of 1965, 42 U.S.C. 1460(c)(4).

II On the basis of the allegations above summarized Appellant by its said complaint sought, *inter alia,* the following relief:

1. A declaration that the sale of the land to Appellee Hahn by the Santa Rosa Appellees at less than fair market value is illegal and in violation of 42 U.S.C. 1460(c)(4) (R. 013-014).[1]

2. A declaration that Appellee HUD is acting illegally and in excess of its authority in approving the agreement between the Santa Rosa Appellees and Appellee Hahn for the disposition of said land (R. 014).

3. A declaration that the agreement between the Santa Rosa Appellees and Appellee Hahn, if carried out, represents a combination in unreasonable restraint of interstate trade or commerce (R. 014).

4. A declaration that said agreement, if carried out, represents an attempt to monopolize, or conspiracy to monopolize interstate trade or commerce (R. 014).

5. A declaration that Appellant, its inhabitants, merchants, property owners and taxpayers are threatened with loss and damage that exceeds the sum of $1,207,000 (R. 014-015).

6. A declaration that Appellant is entitled to sue for and have injunctive relief against said threatened loss (R. 015).

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1. This is a reference to the Record on Appeal. [2]

7. *A permanent injunction permanently restraining:*

(a) Appellee HUD from approving the land disposition agreement between the Santa Rosa Appellees and Appellee Hahn (R. 015);

(b) Santa Rosa Appellees from selling, transferring or otherwise disposing of all land acquired or to be acquired by them for sale, transfer or other disposition to Appellee Hahn for use by it in connection with or as part of said regional shopping center (R. 015).

(c) Appellee HUD from authorizing, approving or taking [3] any action whatsoever without first complying with the National Housing Act, 42 U.S.C. 1460(c)(4).

III Appellant does not seek damages for the violations of law alleged in its complaint. It seeks only declaratory and injunctive relief as above set forth.

IV After filing their respective answers to Appellant's complaint, Appellees each interposed separate motions for summary judgment.

V The admissible evidence adduced before the District Court on said motions establishes without conflict that the price at which the urban renewal land is to be sold under the terms of said contract is substantially less than its fair reuse value.

VI The admissible evidence adduced before the District Court on said motions establishes without conflict that Appellee HUD in approving and concurring in the price at which said land is to be sold violated all the rules promulgated by it for the determination of fair reuse value of urban renewal land.

VII The District Court granted said motions for summary judgment on the ground that Appellant had failed to establish that Appellees had violated the Sherman Act. The District Court did not pass on the issue whether Appellant was entitled to relief by reason of the sale of said urban [4] renewal land at less than fair reuse value. Following the granting of said motions for summary judgment, Appellant filed this appeal.

VIII Thereafter, the parties filed their briefs and on *December 4, 1978* the appeal was orally argued before this Court. Upon the conclusion of the argument the matter was submitted to the Court for decision.

IX Following the submission of the cause for decision, and on *May 9, 1979,* the Court filed its *first* opinion herein which was adverse to Appellant, and whereby the Court remanded the matter to the District Court for dismissal in accordance with the opinion. Thereafter, Appellant filed a timely petition for rehearing, and for a rehearing in banc. Later, this Court having denied Appellant's petition, withdrew its opinion of *May 9, 1979,* and replaced it with a *second* opinion filed on *July 24, 1979.* This opinion was also adverse to Appellant, and the Court thereby again remanded the cause to the District Court for dismissal. Subsequently, Appellant filed another timely petition for a rehearing and for a rehearing in banc. This Court has not as yet ruled on this petition.

X During the period *December, 1978,* to *July, 1979* and while this Court was devoting its time and resources [5] to arrive at a judgment in this cause the Appellees were engaged in a concerted and determined effort to "moot" it by placing the *res,* i.e., the urban renewal land in question, beyond the reach of the process of this Court [18 U.S.C. 401(3)], by transferring possession and title thereto to Appellee Hahn, thus enabling it to proceed with the construction of the projected shopping center thereon.

XI Insofar as Appellant and its counsel know, this Court has not been informed of this transfer of possession

and title, and Appellant and its counsel did not learn of it until on or about August 6, 1979.

XII On August 21, 1979, Appellant's counsel filed with Appellee HUD a request for production and disclosure of records under the Freedom of Information Act (5 U.S.C. 552). Pursuant to this request and on about September 4, 1979, Appellant received from Appellee HUD a number of copies of documents which disclose some of the details of said transfer of possession and title.

The earliest of these documents, is a letter dated *January 15, 1979,* from Appellee Urban Renewal Agency[2] to the acting Area manager of Appellee HUD. A true copy of said letter, marked Exhibit "A", is attached hereto and made a part hereof. The purpose of this letter was to request a waiver from HUD of the requirements of Section 106(E) of the Loan and Grant contract of June 2, 1962 entered into by and between Appellee Urban Renewal Agency and Appellee HUD. Section 106(E) provides:

> "(E) *Sales of Project Land to be for Cash*—With respect to all Project Land which the Local Public Agency sells, each such sale shall be for cash to be paid to it in full not later than the date of delivery of the instrument of conveyance thereof."

This waiver is requested, as the letter explains, in order to permit Appellee Agency "to convey title to the project property" to Appellee Hahn "in advance of the Agency's actual receipt of the Developer's payment for the land" (Ex. "A", p. 1). This waiver, when granted, in effect permits Appellee Agency to sell the urban renewal land to Appellee Hahn on credit without any interest charge, and at a price which is substantially less than its fair reuse value.

2. Now known as "Housing and Development Agency." [6]

This letter also discloses that a part of the urban renewal land was sold to Appellee Hahn in *December, 1978,* and that Appellee Hahn has been at least since that date engaged in constructing a "store" on this land. This is explained in the letter in detail, as follows:

> "The Agency has entered into a contract, dated December 1, 1975, for sale of project land to Ernest W. Hahn, Inc., for development of a regional [7] shopping center to be located in Phases II and III of the project. *This contract and the sale price of the land were approved by HUD on November 7, 1975.* Under this contract and plans prepared by Hahn, Hahn will develop a 30-acre regional shopping center that will eventually include approximately 684,000 square feet of gross leasable space, three major department stores, a mall and parking facilities. *One of the major tenants of the shopping center, Sears, Roebuck & Company, is presently operating a retail department store in the project area in a cramped and obsolete structure. Under the terms of Hahn's agreements with Sears, Hahn will construct the new store for Sears first.* Because of the project delays caused by continued litigation, described below, *Hahn was required to enter the site of the future Sears store before escrow could be closed on this parcel for certain preliminary site work for the Sears store,* in order to meet its commitments to Sears. Under the severe time restraints imposed by those commitments, it was necessary for Hahn to use its own funds (not loan funds) *to purchase a portion of the Phase II land in December 1978, to enable the construction of the Sears store to continue,* even though title was subject to two lis pendens and the Agency was technically and legally not in a position to convey clear title to the land as required by the Hahn contract."[3] (Exhibit A, pp. 1-2.)

3. All emphasis added to quoted material is ours, unless otherwise indicated. [8]

The above quoted part of the letter establishes that title and possession of a part of the urban renewal land was transferred to Appellee Hahn as early as *December, 1978,* and that the consideration paid is substantially less than the fair reuse value of the land.

That the waiver sought by Appellee Agency is required in order to permit the "project to proceed" is explained in the letter as follows:

> "Lastly, the approach outlined will benefit HUD because quite simply, it will enable us to repay the loan from HUD. Under the Contract, the HUD loan will not begin to be repaid, in effect, until the project land is sold. The sequence of litigation and the succession of obstacles previously described has indicated that some form of special arrangement that differs from the conventional transactions contemplated by the terms of the Loan and Grant Contract may be necessary for the project to proceed. For these reasons, the Agency and Hahn have developed the arrangement outlined above as providing a practical solution of the difficulties encountered and we are requesting the necessary waiver at this time *to permit the project to proceed.*" (Exhibit A, pp. 4-5.)

The other documents furnished to Appellant by Appellee disclose that HUD's Area Office made a favorable recommendation on the request for the waiver to an Assistant Secretary of HUD and that on *July 31, 1979,* the desired waiver was granted by Appellee HUD. True copies of these documents, marked as Exhibits "B", "C", "D", "E", "F", "G", "H", "I", "J", "K" and "L" respectively, are attached hereto, and made a part hereof.

These documents also disclose that the grant of the waiver was the result of close and harmonious collaboration between Area Counsel for HUD and the attorneys of record herein for Santa Rosa Appellees. Area Counsel is

not an attorney of record for HUD in this litigation. There is nothing in these documents which indicates that the attorneys of record for Appellee HUD participated in or had any knowledge of the steps [9] taken to transfer title and possession of the urban renewal property to Appellee Hahn.

HUD's Area Counsel have refused to disclose to Appellant the document or documents in which they recommended to the Assistant Secretary of HUD that he act favorably on the request for the waiver.

On *July 31, 1979,* the Deputy Area Manager for HUD wrote a letter to Appellee Urban Renewal Agency in which was enclosed a "duplicate original" of the requested waiver. This letter reads in pertinent part as follows:

> "Enclosed you will find an executed duplicate original Waiver No. 3 by which the Government waives Section 106(E) of the subject loan and grant contract to the extent necessary to allow conveyance of certain project land prior to payment by the redeveloper, but only upon deposit into escrow of an irrevocable unconditional letter of credit in the full amount of the purchase price.
>
> "Please understand that the waiver is of no force and effect unless and until the letter of credit has been placed into escrow.
>
> *"We congratulate you on coming another step closer to both physical completion of the project* and financial settlement of the outstanding Project Temporary Loan." (Exhibit "K".)

The last paragraph of the Waiver enclosed with the above quoted letter states:

> "NOW THEREFORE, the United States of America, acting by and through the Secretary of the Department of Housing and Urban Development hereby waives Section 106(E) of the Contract to the

extent necessary [10] to allow the Local Public Agency *to convey title to the balance of the shopping center site to the Redeveloper upon deposit into escrow of an irrevocable unconditional letter of credit for $1,140,000 in lieu of cash representing the total purchase price* with instructions to the escrow holder to pay the entire sum over to the Local Public Agency upon demand no later than the opening of any portion of *the shopping center presently being constructed by the Redeveloper* in the Calif. R-45 Project Area."

Presumably pursuant to the terms of the waiver, the Bank of America issued an "Irrevocable Standby Letter of Credit," dated July 27, 1979, in the sum of $1,140,000. This letter of credit, which is addressed to Appellee Agency reads in part as follows:

"GENTLEMEN:
"We hereby establish our irrevocable letter of credit in your favor available by your drafts drawn at SIGHT on US* and accompanied by documents specified below.

"COVERING: SANTA ROSA MALL LAND PURCHASE REGARDING ESCROW NUMBER 116954 WITH TITLE INSURANCE AND TRUST COMPANY.

"NO OTHER DOCUMENT REQUIRED.

"*STATING THAT THE PERSON EXECUTING DRAFTS IS THE CURRENT EXECUTIVE DIRECTOR OF REDEVELOPMENT AGENCY OF THE CITY OF SANTA ROSA."

By the acts above described, the Appellees put the urban renewal property beyond their control as well as that of this Court. By joining in these acts Appellee HUD took

upon itself the right to decide in favor of the Santa Rosa Appellees and Appellee Hahn. This use of power is an [11] arrogation of this Court's responsibility. Appellees' aim in taking this action is to thwart any adverse decree which might ultimately be forthcoming on the appeal. This in effect is resistance to this Court's lawful writ, process, order, rule, decree or command. Accordingly, Appellees are guilty of civil contempt.

WHEREFORE, Appellant prays for relief as follows:

1. A judgment of civil contempt upon Defendants-Appellees;

2. Restoration of the *status quo* by issuing an order commanding Appellee Hahn, its agents, representatives, servants and employees forthwith to stop all further construction in the urban renewal land and commanding them forthwith to relinquish possession of said land;

3. Restoration of the *status quo* by an order commanding Appellees, their agents, representatives, servants and employees to take no further action to transfer title to the urban renewal land from Appellee Agency to Appellee Hahn.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By WILLIAM M. BRINTON
Attorney for Appellant

Dated: September 27, 1979. [12]

EXHIBIT "A"

Department of Housing and
Urban Development
Jan 17 1979

Area Director's Office
San Francisco, California
January 15, 1979

Robert L. Cunningham
Acting Area Manager
Department of Housing and
Urban Development
One Embarcadero Center
Suite 1600
San Francisco, California 94111

Reference: Santa Rosa Center Redevelopment Project
(Calif.R-45)—Request for Waiver

Dear Mr. Cunningham:

The purpose of this letter is to request a waiver by your office of the requirements of Section 106(E) and any other applicable provisions of the Loan and Grant Contract dated June 6, 1962, as amended, between the U.S. Department of Housing and Urban Development (HUD) and the Agency. This waiver is requested in order to permit the Redevelopment Agency to convey title to project property to the Developer in advance of the Agency's actual receipt of the Developer's payment for the land. The purchase price of the parcel will be held in escrow until certain recorded lis pendens have been lifted.

Since 1961, the Agency has been carrying out the Santa Rosa Center Project, a redevelopment project in downtown Santa Rosa. The project is in three phases, the first two phases of which are receiving federal financial assistance

under the HUD Loan and Grant Contract (the "Contract"). As you are aware, under the terms of the Contract the proceeds of the resale of land in the covered portion of the project area will be paid by the Agency to HUD.

The Agency has entered into a contract, dated December 1, 1975, for sale of project land to Ernest W. Hahn, Inc., for development of a regional shopping center to be located in Phases II and III of the project. This contract and the sale price of the land were approved by HUD on November 7, 1975. Under this contract and plans prepared by Hahn, Hahn will develop a 30-acre regional shopping center that will eventually include approximately 684,000 square feet of gross leasable space, three major department stores, a mall and parking facilities. One of the major tenants of the shopping center, Sears, Roebuck & Company, is presently operating a retail department store in the project area in a cramped and obsolete structure. Under the terms of Hahn's agreements with Sears, Hahn will construct the new store for Sears first. Because of the project delays caused by continued litigation, described below, Hahn was required to enter the site of the future Sears store before escrow could be closed on this parcel for certain preliminary site work for the Sears store, in order to meet its commitments to Sears. Under the severe time restraints imposed by those commitments, it was necessary for Hahn to use its own funds (not loan funds) to purchase a portion of the Phase II land in December 1978, to enable the construction of the Sears store to continue, even though title was subject to two lis pendens and the Agency was technically and legally not in a position to convey clear title to the land as required by the Hahn contract.

As your office is aware, since 1972, the project has been subjected to a series of lawsuits, totalling approximately

18, the majority of which have been financed in whole or in part by Codding Enterprises, owner and operator of competing shopping centers in the trade area. The decisions of the Agency, the decision of HUD and the efforts of the Agency to obtain financing for the project have routinely been attacked in court in a continual effort to halt the project. All of the lawsuits that were filed before October 18, 1978, have been resolved in favor of the Agency by the trial courts or have been dismissed. Appeals have been taken in five of the Codding-financed cases, resulting in one remand to the Agency for the making of necessary formal findings from the administrative record already compiled. The most recent lawsuit (as of the date of this letter) was filed on October 18, 1978.

Despite the continuous litigation, the Agency was able to sell $5,000,000 worth of Tax Allocation Bonds in 1977 by pledging the tax increments from other portions of the project. Project improvements to be provided by the Agency that are necessary prior to the sale of the Sears parcel to Hahn have been substantially completed. In apparent recognition that despite all efforts, the project has proceeded to a point enabling the sale of land to Hahn, Codding recorded a lis pendens covering the project property on February 27, 1978, three days after the Agency took action to authorize the sale of the Sears parcel to Hahn. On October 12, 1978, the court directed that an order be entered expunging this lis pendens. The following day, additional project opponents recorded a lis pendens covering another of the actions pending against the Agency. In the lawsuit filed on October 18, 1978, project opponents, for the first time to our knowledge in any of the litigation to date, requested among the relief sought a declaration that the action affected title to real property.

It is apparent to us and to Hahn that since any number of future lawsuits may be filled by different parties contesting project activities, the title to the project property may remain perpetually clouded, thus preventing Hahn from obtaining financing for the purchase of the land, notwithstanding the routine resolution of project litigation in favor of the Agency.

In order to stop this merry-go-round, the parties propose a sale of the land under an arrangement whereby title will pass to Hahn upon payment of the sale price into escrow, with provision for payment of the funds out of escrow to the Agency after the then-current lis pendens have been expunged. In the event that those lis pendens that are of record when title vests in Hahn have not been expunged by a certain date, the sale will be rescinded, the purchase price returned to Hahn and the land returned to the Agency free of liens and encumbrances, if any, created by the Developer's activities on the site.

We are informed that Hahn has explored this method of conveyance with potential lenders and that under the proposed escrow arrangement, Hahn anticipates that it will be able to obtain financing for the purchase of the land. Hahn has been unable to obtain financing from lenders for a purchase of the land without the escrow of the sale price as described. Discussions of this proposal with representatives of HUD indicate that a waiver of applicable provisions of the Contract would be necessary, particularly of Section 106(E) of Part II of the Terms and Conditions which provides:

> "(E) *Sales of Project Land to be for Cash*—With respect to all Project Land which the Local Public Agency sells, each such sale shall be for cash to be paid to it in full not later than the date of delivery of the instrument of conveyance thereof."

We believe that under the proposed approach, substantial benefits will result for HUD, for the Project, for Hahn, and most importantly, for the people of Santa Rosa, who have waited several years for this Project to become a reality. Cost increases and loss in City and Agency revenues resulting from delay in the construction of the shopping center are substantial and are due to a number of factors including inflation of construction costs conservatively estimated at 10% per year, interest on our HUD temporary loan, repayment of which must be postponed until the land is sold to Hahn, administrative and legal costs caused by delay, loss of property taxes on the land that is awaiting sale to Hahn, and loss of sales tax revenues above current levels that will be generated by the shopping center.

The delay of the project is estimated to increase the cost to Hahn, the department stores and the mall shop tenants by approximately $13,700 per day, or over $410,000 per month. The cost to the City and the Agency is estimated to be $1,400 per day, or over $40,000 per month, for the HUD loan, administrative costs, legal fees and the increase in public improvement costs. When the loss of future municipal revenues are added, i.e. property taxes and sales taxes, the costs per day increase by $2,640, bringing the total public cost to $4,040 per day, or almost $125,000 per month. A major delay will also have other impacts. It will postpone the date when new construction and permanent jobs are made available to the community. An extensive delay could cause a default in the existing tax allocation bond issues.

Lastly, the approach outlined will benefit HUD because quite simply, it will enable us to repay the loan from HUD. Under the Contract, the HUD loan will not begin to be repaid, in effect, until the project land is sold. The sequence

of litigation and the succession of obstacles previously described has indicated that some form of special arrangement that differs from the conventional transactions contemplated by the terms of the Loan and Grant Contract may be necessary for the project to proceed. For these reasons, the Agency and Hahn have developed the arrangement outlined above as providing a practical solution of the difficulties encountered and we are requesting the necessary waiver at this time to permit the project to proceed.

We appreciate your time and attention in this matter and look forward to your early reply. If you have any questions or need additional information, please contact the undersigned.

Yours very truly,

REDEVELOPMENT AGENCY OF
THE CITY OF SANTA ROSA

JAMES K. BURNS
James K. Burns
Executive Director

JKB:mk

EXHIBIT "B"

JAN 25 1979

9.3CM-B

Mr. James K. Burns
Executive Director
Redevelopment Agency of the
City of Santa Rosa
P.O. Box 1678
Santa Rosa, CA. 95402

Dear Mr. Burns:

Subject: Project No. Calif. R-45
Santa Rosa Redevelopment Project
Request for Waiver

This is in response to your letter dated January 15, 1979 requesting a waiver of Section 106(E) of Part II of the Loan and Capital Grant Contract between HUD and the LPA which would allow title to most of the remaining project land to pass to the redeveloper upon deposit of the purchase price into escrow rather than at the usual close of escrow.

We propose to make a favorable recommendation to the Assistant Secretary for CPD on this waiver. However, before the Area Office forwards the request to Central Office for consideration, we should have in hand the actual escrow agreement proposed between the redeveloper and the LPA. Counsel for the LPA understands that HUD Area and Central Office legal and program staffs would have an opportunity to comment on this agreement and make revisions considered necessary as a condition precedent to approval of the requested waiver.

Please forward the draft escrow agreement at your earliest convenience.

Thank you for your cooperation.

Sincerely,

Original signed by:
G. Richard Schermerhorn

9.3CM-B.HALL:csf:1/24
9.3CM-B Hall
Chron
A.O. file

Robert P. Cunningham
Deputy Area Manager
Department of Housing
and Urban Development
Apr 9 1979
Area Directors Office
San Francisco, California

EXHIBIT "C"

Department of Housing
and Urban Development
Apr 9 1979
Area Director's Office
San Francisco, California

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
(A Professional Corporation)
Attorneys

April 6, 1979

Robert L. Cunningham
Acting Area Manager
Department of Housing and
Urban Development
One Embarcadero Center
Suite 1600
San Francisco, California 94111

Re: Project No. Calif.R-45, Santa Rosa
Redevelopment Project, Request for Waiver

Dear Mr. Cunningham:

This firm represents the Redevelopment Agency of the City of Santa Rosa. Reference is made to James K. Burns letter to you, dated January 15, 1978, requesting a waiver of provisions of the Loan and Grant contract to permit a conveyance of property to the redeveloper and escrowing of the purchase price until certain *lis pendens* are expunged by the Agency, and your letter to Mr. Burns dated January 25, 1978, requesting a copy of the parties' escrow instructions for review by your office.

Enclosed is a copy of the Joint Escrow Instructions of the parties. If you have any questions, please feel free to

contact the undersigned. Thank you for your attention in this matter.

Very truly yours,

ALICE A. WOODYARD
Alice A. Woodyard

AAW:vlp
Enclosure
cc: David Sutton, Esq.
James K. Burns
Steve Watry
Richard B. Maxwell, Esq.
Edward Krasnove, Esq.
[all with enclosure]

EXHIBIT "D"

Received
Apr 27 1979
AS DEPT HUD
Area Counsel
Region IX

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
(A Professional Corporation)
Attorneys
April 25, 1979

David Sutton, Esq.
Office of the Area Counsel
Department of Housing and
Urban Development
One Embarcadero Center
Suite 1600
San Francisco, CA 94111

RE: Project No. Calif. R-45, Santa Rosa Redevelopment Project, Request for Waiver

Dear Dave:

In accordance with our conversations on April 17 and April 23, I am enclosing copies of the following documents:

1. Specific Indemnity Agreement referenced in Section C-1 of the Joint Escrow Instructions. Counsel for the Redeveloper has approved this document.

2. Revised Joint Escrow Instructions adding requirement of public liability insurance. Counsel for the Redeveloper has approved of the revisions.

3. Pages 3, 4, 5 and 9 of the Joint Escrow Instructions showing changes in the prior draft.

This will also confirm for you that the Form of Special Warranty Deed used for this conveyance will be substantially the same as that used for the conveyance of the Sears Parcel. That Deed was approved by David Kroot of your office for the Sears conveyance. I will mail you a copy of the Deed that will be used for this conveyance.

Counsel for the Redeveloper is contacting the lender with regard to confirmation of plans to issue the letter of credit and to obtain a copy of a proposed form of letter of credit for your review. We will provide you with that material as soon as possible.

Please contact me if there are any questions or problems with any of the enclosed material.

Very truly yours,

ALICE

Alice A. Woodyard

AAW:vlp
Enclosures
cc: Robert L. Cunningham
James K. Burns
Steve Watry
Richard B. Maxwell, Esq.
Edward Krasnove, Esq.

EXHIBIT "E"

Received
May 11 1978
US DEPT HUD
Area Counsel
Region IX

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
(A Professional Corporation)
Attorneys
May 10, 1979

David Sutton, Esq.
Department of Housing and Urban Development
One Embarcadero Center
Suite 1600
San Francisco, CA 94111

RE: Santa Rosa Center Project, Calif. R-45

Dear Dave:

Enclosed is a copy of the form of Special Warranty Deed that will be used for the conveyance of the balance of the property to Hahn. This form of Deed is submitted for your approval in accordance with the Loan and Grant Contract.

Minor changes have been made in the form of Deed that was approved by David Kroot of your office for the earlier conveyance to Hahn. For your convenience, a copy of the changed pages with changes underscored is enclosed. The change on page 3 has reference to the lien imposed to secure payment of the developer's contribution, the details of which transaction are still being worked out in the parties' Second Implementation Agreement. This Agreement will be submitted to your office for HUD approval prior to its execution.

When you have had an opportunity to review this form. please advise me as to whether the Deed is acceptable to HUD. Thank you.

Very truly yours,

ALICE
Alice A. Woodyard

AAW:kd
Enclosures
cc: James K. Burns
Edward Krasnove, Esq.
Richard B. Maxwell, Esq.

EXHIBIT "F"

May 15, 1979

Office of Area Counsel 9.H.

Ms. Alice A. Woodyard
McDonough, Holland, Schwartz & Allen
555 Capitol Mall, Suite 950
Sacramento, California 95814

Dear Alice:

Subject: Project No. Calif. R-45, Santa Rosa Redevelopment Project, Special Warranty Deed

The form of Special Warranty Deed which you submitted for HUD review by your letter of May 10, 1979, is acceptable for use in conveying the balance of the shopping center site to Hahn.

All previously submitted documentation with regard to the Redevelopment Agency's January 15, 1979, waiver request has been reviewed for legal acceptability and a draft waiver has been prepared along with a preliminary legal memorandum explaining the need for the waiver and recommendation that the waiver request be given favorable consideration once it has been fully documented.

A final legal recommendation on the waiver will be made once the Second Implementation Agreement and the pro forma letter of credit have been received and reviewed.

Please let me know if I can try to be of any further assistance in obtaining these last documents.

Sincerely,

Original signed by:
David L. Sutton
David L. Sutton
Deputy Area Counsel
bcc: 9.3S, AMO 9.36:SUTTON:gmm:5/15/79

EXHIBIT "G"

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
Attorneys

June 4, 1979

David L. Sutton, Esq.
Office of Area Counsel
Department of Housing and
Urban Development
One Embarcadero Center, Suite 1600
San Francisco, CA 94111

RE: Project No. Calif. R-45,
Santa Rosa Center Project

Dear David:

We are pleased to learn of the proposed favorable recommendation of the request by the Santa Rosa Redevelopment Agency for a waiver of Section 6(e) of the Loan and Grant Contract for the above referenced project and appreciate your very prompt action on this request. Enclosed is a copy of the draft Second Implementation Agreement referred to in the Joint Escrow Instructions which were previously submitted in connection with the waiver request.

You will note that the Second Implementation Agreement is in large part aimed at implementing the Redeveloper's agreement to make annual payments to the Agency, based on a formula relating to floor area in the shopping center and secured by a lien on the property, in order to partially compensate the Agency for reductions in tax increments resulting from the passage of Proposition 13.

The obligation of the Redeveloper just referred to will not commence until the Shopping Center is opened, and

thus these provisions of the Second Implementation Agreement should not be of significant concern to HUD, since they will become operative well after the project is closed out. Negotiation of this aspect of the Second Implementation Agreement has involved the major department stores, since those stores are directly interested in the outcome, and the Agreement is not yet in final form in this area.

The draft Second Implementation Agreement is submitted at this time in connection with your review of the Agency's request for a waiver of Section 6(e) of the Loan and Grant Contract. It is our intention to submit the final form of the Second Implementation Agreement for review by your office independently of your consideration of the Agency's request for a waiver. Except for the annual payment provisions, the Redeveloper and the Agency are substantially in agreement on the present language of the document. The following discussion of the Second Implementation Agreement relates to areas in which documents previously approved by HUD are being modified or affected by the Second Implementation Agreement, which you may wish to review in connection with the Agency's waiver request.

Your office has previously approved the Contract for Sale of Land for Private Redevelopment, and the First Implementation Agreement to that Contract. Among other modifications to the Contract for Sale of Land, the First Implementation Agreement postponed the Agency's obligation to refund the Redeveloper's Deposit from the time that the Redeveloper is ready to build to the time that the Certificate of Completion is issued, but required that the Agency pay interest at 8% per annum from the time that the Redeveloper is ready to build. The Second Implementation Agreement specifies that the Agency's obligation to

refund the Redeveloper's Deposit is conditioned upon the availability of project revenues available to the Agency after repayment of Agency indebtedness incurred with respect to the project. (This arrangement also is made applicable to the Agency's repayment of the Redeveloper's Cost Advance.)

The amended Schedule of Performance, Attachment "D, Amended-2", has not yet been prepared.

The arrangement contemplated in the Joint Escrow Instructions, whereby title will pass to the Redeveloper prior to the Agency's actual receipt of the purchase price in cash, is potentially in conflict with certain provisions of the Contract for Sale of Land; see, for example, Sections 1(b)(1) and 1(b)(5) of that Contract. Therefore, the Second Implementation Agreement (Section 16-1) modifies the Contract for Sale of Land to the extent necessary to permit conveyance to the Redeveloper in accordance with the provisions of the Joint Escrow Instructions.

I understand that you do not anticipate that it will be necessary to have the final draft of the Second Implementation Agreement in order to complete your review of the Agency's waiver request and make a final legal recommendation. As I indicated in our conversation on May 21, there are timing problems since that Agreement has not been negotiated to final form in the area of the annual payment provisions. I hope that this letter will be of some assistance in your final review of the waiver. It does not appear to me that the provisions of the Second Implementation Agreement are of major importance to HUD's determination on whether to grant the waiver. As I have indicated, we do intend to submit the final Second Implementation Agreement for review and approval independent of the waiver request.

I would like to thank you for all the time and effort you have devoted to this project. If there are any questions, please feel free to call.

Very truly yours,

ALICE

ALICE A. WOODYARD

AAW:t'p
Enclosure

EXHIBIT "H"

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation

Attorneys
July 24, 1979

David L. Sutton, Esq.
Office of the Area Counsel
Department of Housing and
Urban Development
One Embarcadero Center, Suite 1600
San Francisco, CA 94111

Dear Dave:

Enclosed are the other deeds I mentioned to you and the parties' Second Implementation Agreement. Please advise us of HUD approval of the Second Implementation Agreement. As we discussed, I understand that you probably will not need to formally review the deeds.

Also, as we discussed, we are making a minor modification to page 2 of the Special Warranty Deed so that it may be used to convey certain easements of support to Hahn in addition to fee title to the main parcel. Please advise if this modification will cause any problem.

Very truly yours,

ALICE

Alice A. Woodyard

AAW:kfd
Enclosures

EXHIBIT "I"

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
Attorneys

555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone 916 444-3900

ENCLOSURE MEMO

To: David L. Sutton
Re: HUD approval—Schedule of Performance:
Santa Rosa Redevelopment Agency

Enclosed is the revised Schedule of Performance which is to be attached to the Second Implementation Agreement. Also enclosed for your convenience is a copy of the Schedule of Performances which was approved by HUD as a part of the First Implementation Agreement of the parties, showing changes.

Date July 27, 1979

By ALICE A. WOODYARD
Alice A. Woodyard

EXHIBIT "J"

July 30, 1979

Office of Area Counsel 9.3G

Ms. Alice A. Woodyard
McDonough, Holland, Schwartz & Allen
555 Capitol Mall, Suite 950
Sacramento, California 95814

Dear Alice:

Subject: Project No. Calif. R-45, Santa Rosa
Second Implementation Agreement with
Revised Schedule of Performances
(Attachment "D Amended-2")

This letter will serve to formalize our telephone discussion of Monday, July 30, 1979, on certain prerequisites to conveyance of remaining project land from the Redevelopment Agency of the City of Santa Rosa to Earnest W. Hahn, Inc.

SECOND IMPLEMENTATION AGREEMENT

The Second Implementation Agreement and Revised Schedule of Performances which you submitted for HUD review on July 24, and July 27, 1979, respectively, are acceptable to HUD with the understanding that nothing in the second implementation agreement affects or modifies the "outer limit clause" found in Part J of the Joint Escrow instructions previously submitted to HUD in support of the Santa Rosa Redevelopment Agency request for Waiver of Section 106(E) of its loan and grant contract with HUD.

It is the understanding of HUD that the joint escrow instructions require payment of the purchase price to the Agency in any event no later than the opening of any portion of the shopping center. This obligation is in no

way dependent upon or tied to the definition of opening contained in Section 13-9 of the Second Implementation Agreement for the purposes of that agreement.

EASEMENT AND QUIT CLAIM

There is no need for further HUD review of or concurrence in the submitted easement deeds or quit claim deeds from the Redevelopment Agency to the City of Santa Rosa. Provision for such conveyances necessary to project implementation is covered under Section IV of the original HUD approved Cooperation Agreement of December 20, 1961, as amended, between the Agency and the City.

GRANTING OF WAIVER REQUEST

After due deliberation, much discussion, and undoubtedly after careful review of the joint escrow instructions and other supporting documents drafted and negotiated by you, Assistant Secretary Embry has authorized the Section 106(E) waiver originally requested by the Redevelopment Agency on January 15, 1979. A duplicate original of the executed waiver will be transmitted directly to the Agency by separate letter.

Your long-suffering personal efforts have been instrumental in finally obtaining the waiver. It has been a pleasure to work with you.

Sincerely,

Original signed by:
David L. Sutton
David L. Sutton
Deputy Area Counsel
9.3G:SUTTON:gmm:7/30/79

EXHIBIT "K"
7/31/79

G.3G

Office of the Area Manager
Redevelopment Agency of the City of Santa Rosa
Post Office Box 1678
Santa Rosa, California 95402
Attention: Mr. James K. Burns
Executive Director

Gentlemen:
Subject: Project No. Calif R-45
Waiver No. 3 to Contract No. Calif. R-45(LG)

Enclosed you will find an executed duplicate original Waiver No. 3 by which the Government waives Section 106(E) of the subject loan and grant contract to the extent necessary to allow conveyance of certain project land prior to payment by the redeveloper, but only upon deposit into escrow of an irrevocable unconditional letter of credit in the full amount of the purchase price.

Please understand that the waiver is of no force and effect unless and until the letter of credit has been placed into escrow.

We congratulate you on coming another step closer to both physical completion of the project and financial settlement of the outstanding Project Temporary Loan.

Sincerely,

/S/
Paul R. Kaup
Deputy Area Manager
9.3G:SUTTON:gmm:7/30/79

WAIVER NO. 3
TO BE ATTACHED TO CONTRACT NO. CALIF. A-45(LG) BY AND BETWEEN THE UNITED STATES OF AMERICA AND THE URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA.

WHEREAS, the United States of America (herein called the "Government") acting by and through the Secretary of the Department of Housing and Urban Development, has entered into a loan and capital grant contract (herein called the "Contract") with the Urban Renewal Agency of the City of Santa Rosa (herein called the "Local Public Agency") dated the sixth day of June, 1962 and Numbered Contract No. Calif R-45(LG) under and subject to the terms and conditions of which the Government has agreed to make a loan and grant to the Local Public Agency in connection with the project described in the Contract; and

WHEREAS, Section 106(E) of the Contract provides as follows:

> (E) *Sales of Project Land To Be For Cash*—With respect to all Project Land which the Local Public Agency sells, each such sale shall be for cash to be paid to it in full not later than the date of delivery of the instrument of conveyance thereof; and

WHEREAS, the Local Public Agency has requested that the above quoted contract condition be waived by the Government to the extent necessary to allow conveyance of title to all of the balance of the shopping center site in the project to Earnest W. Hahn, Inc., a California Corporation, (herein called the "Redeveloper") upon deposit into escrow of an irrevocable, unconditional letter of credit for

$1,140,000 in lieu of cash representing the total purchase price of such balance of shopping center site, with instructions to the escrow holder to pay the entire sum over to the Local Public Agency no later than the opening of any portion of the shopping center presently being constructed by the Redeveloper in the Calif. R-45 project area; and

WHEREAS, the Local Public Agency and the Government are deemed to be adequately protected against the possibility of the Redeveloper's failure to perform by the escrow instructions providing for recission of the conveyance and return of the balance of the shopping center site to saleable condition if the letter of credit is not honored upon demand made by the Local Public Agency; and

WHEREAS, it has been determined that the mutual interests of the parties to the contract would best be served if the above quoted provisions of the Contract were waived to the extent necessary to permit immediate conveyance of title to the balance of the shopping center site upon deposit into escrow of an irrevocable, unconditional letter of credit for the full purchase price:

NOW THEREFORE, the United States of America, acting by and through the Secretary of the Department of Housing and Urban Development hereby waives Section 106(E) of the Contract to the extent necessary to allow the Local Public Agency to convey title to the balance of the shopping center site to the Redeveloper upon deposit into escrow of an irrevocable unconditional letter of credit for $1,140,000 in lieu of cash representing the total purchase price with instructions to the escrow holder to pay the entire sum over to the Local Public Agency upon demand no later than the opening of any portion of the shopping center presently being constructed by the Redeveloper in the Calif. R-45 Project Area.

IN WITNESS WHEREOF, the Government has caused this Waiver to be duly executed this 31st day of July, 1979.

UNITED STATES OF AMERICA
Secretary of Housing and Urban Development

By: PAUL R. KAUP
Deputy Area Manager
San Francisco Area Office

EXHIBIT "L"

To Henry Dishroom, 10 Mgr., DHUD, SFAO
Attn: Salvatore P. Tedesco
BT
7/31/79

To: Henry Dishroom, Area Manager Date: 30 Jul 1979
San Francisco Area Office, 9.35
Attention: Salvatore P. Tedesco

From: Robert C. Embry, Jr., Community Planning and Development, C

Subject: Santa Rosa Center Redevelopment Project
Project No. California R-45
Request for waiver

We have reviewed the attached waiver form and other documentation proposed to be used in connection with the sale of project land. The sale would be made to the Redeveloper under an agreement for deposit of the purchase price of the parcel into an escrow account at time of settlement.

Section 106(E) of the loan and grant contract requires land proceeds to be paid in full to the LPA at the time of conveyance of title. Since the Santa Rosa Redevelopment Agency Escrow Arrangement provides an acceptable means of protecting the federal interest, the waiver is hereby granted.

The Department's authority to deduct block grant funds for loan payment under Section 112(A) of the Housing and Community Development Act of 1974 provides further assurance that the federal financial interest is being protected.

Therefore, in determining projected land disposition proceeds for Section 112(A) purposes, the sale proceeds should be excluded as project assets while escrowed.

Attached to this memorandum is the proposed contract with corrections noted by the Office of General Counsel with regard to the references to an unconditional irrevocable Letter of Credit.

/s/
Robert C. Embry, Jr.
Assistant Secretary
RT
NNNN
067 143 WL SML
Department of Housing and Urban Development
Jul 31 1979
Area Director's Office
San Francisco, California
SFAO Comm Center
31 Jul 1979 15 04
JD 212
Serial # 108

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 27, 1979, he served one copy of Plaintiff-Appellant's Motion For Judgment of Civil Contempt Upon Defendants-Appellees Pursuant to Rule 27, Federal Rules of Appellate Procedure and Points and Authorities in Support of Motion, on each party separately represented by the following counsel:

John J. Powers III, Esq.
Appellate Section
Antitrust Division
Department of Justice
Washington, D.C. 20530

G. Williams Hunter, Esq.
Paul E. Locke, Esq.
450 Golden Gate Avenue
Post Office Box 36055
San Francisco, Calif. 94102

Joseph E. Coomes, Jr., Esq.
Richard E. Brandt, Esq.
McDonough, Holland,
Schwartz & Allen
555 Capitol Mall, Suite 950
Sacramento, California 95814

William N. Willens, Esq.
Barrett, Stearns, Collins,
Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrance, California 90503

by mailing said copies postage prepaid to the offices of said attorneys in accordance with the requirements of Rule 25, Federal Rules of Appellate Procedure.

RICARDO J. HECHT
Ricardo J. Hecht

Appendix P(2)

Received/Counter
Emil E. Melfi, Jr.
Clerk, U.S.C.A.
1979 Sep 27 PM 3:41
Filed.....
Docketed.....
Date Initial

In the United States Court of Appeals
for the Ninth Circuit

NO. 7-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

POINTS AND AUTHORITIES IN
SUPPORT OF MOTION

William M. Brinton, Esq.
Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
1400 Alcoa Building
One Maritime Plaza
San Francisco, Calif. 94111
Tel: (415) 397-4600
Attorneys for Plaintiff-Appellant

In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

POINTS AND AUTHORITIES IN
SUPPORT OF MOTION

I *The Acts and Conduct of Defendants-Appellees Constitute a Contempt of This Court*

Although no Court has issued an injunction against the transfer of possession and title to the urban renewal land the Appellees *know* that if Appellant succeeds in this appeal that such an injunction would issue. Under such circumstance the pending appeal is a "process" of this Court which is still alive, and which Appellees by their actions have resisted in violation of 18 U.S.C. 401(3). Such is the teaching of the [1] Court in *Griffin v. County School Board of Prince Edward County, Va.*, 363 F.2d 206 (4 Cir. 1966); cert. den. 385 U.S. 960. There the Appellee Board of Supervisors of Prince Edward County and its members disbursed public funds to private segregated schools while their right

to do so was under consideration by the Court of Appeals in connection with an appeal taken by the Plaintiffs-Appellants. Following the disbursement of the funds, the Plaintiffs-Appellants sought by motion a judgment of contempt against the Appellees, and a remedial order requiring the Appellees to restore the disbursed funds to the County. The Appellees attempted to defend against the motion on the argument that the power of the Court to punish for contempt is limited by statute to the violation of extant orders and decrees. The Court rejected the argument and found the Appellees guilty of contempt, and in explaining its ruling said (363 F.2d 210-212):

> "That these acts of the Board of Supervisors constituted a contempt of this court is beyond cavil. The Board undertook to put the money then available for tuition grants—and then wholly subject to its orders—beyond its control as well as that of the court. In doing so the Board took upon itself to decide its right to exercise, in favor of the private school, the Board's general power to appropriate public funds. This use of power was, as the Board was acutely aware, an arrogation of this court's responsibility. Obviously, the aim was to thwart the impact of any adverse decree which [2] might ultimately be forthcoming on the appeal. In effect it was a 'resistance to its [this court's] lawful writ, process, order, rule, decree, or command'. 18 U.S.C. § 401(3). The authorities are quite clear on the point.
>
> "The Board would escape the judgment of contempt on the argument that the statute limits the power of the court to violations of orders or decrees then extant. But precedent does not so contract the statute or constrict its intent. Although this court had not issued an injunction against the appropriation of the moneys to tuition grants, the Board knew that if the plaintiffs succeeded this would be its ultimate decree as in fact

it became. That potential decree was thus then within the statute. Furthermore, the appeal was itself a 'process' which was alive at the time of the disbursement and was resisted by the disbursement.

"In Merrimack River Savings Bank v. Clay Center, 219 U.S. 527, 31 S.Ct. 295, 55 L.Ed. 320 (1911), a temporary injunction had been issued by a Federal District Court to prevent the destruction by a municipality of a public utility's poles and wires, located in the city streets under an authorized franchise. The suit was dismissed on jurisdictional grounds. However, for and during an appeal to the Supreme Court, the injunction was continued in force. On this review the dismissal was upheld. But before the mandate of dismissal had been issued or could issue, and in the period allowed for presenting an application for a rehearing, the City cut down the poles, destroyed a large section of the wires and thus put the utility out of business. This conduct was declared to be contempt of the Supreme Court, Justice Lurton saying at 535-536, 31 S.Ct. at 296:

> " 'It does not necesarily follow that disobedience of such an injunction, intended only to preserve the status quo pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of [3] the appeal beyond its control, or by its destruction. This we need not decide, since *irrespective of any such injunction actually issued the wilful removal beyond the reach of the Court of the subject-matter of the litigation* * * [on] *appeal* * * * *is, in and of itself, a contempt of the appellate jurisdiction of this court.* * * * Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent.' (Accent added.)

"The contempt power declared in the *Merrimack* case was not suggested to be rooted in the inherent power of the Supreme Court rather than in the statute now embodied in 18 U.S.C. § 401(3). Incidentally, the Court has never excluded itself from the statute. Cf. Ex parte Robinson, 19 Wall. 505, 86 U.S. 505, 509, 22 L.Ed. 205 (1873). But *Merrimack* is not now cited to power. It is cited as warranting our finding that the putting of the subject-matter of this litigation beyond our reach was a defiance of this court, an anticipatory resistance to its ultimate orders or process.

"That inferior courts have the same contempt power as the Supreme Court exerted in *Merrimack,* and that similar conduct is contempt of the lower courts, were unequivocally enunciated in Lamb v. Cramer, 285 U.S. 217, 219, 52 S.Ct. 315, 76 L.Ed. 715 (1932). There, as in the case now on review, no injunction or order had been issued restraining disposition of the property in suit. Nevertheless, receipt and possession of a part of the res, pendente lite, by a transferee of the defendant-owner was adjudged a contempt of the trial court. The Court had no difficulty in concluding that there was contempt despite the absence of a current restraining order.

"While Lamb v. Cramer, supra, did not specifically mention the statute, the Court obviously did not think it barred prosecution of the transferee [4] for contempt. Essentially, the Court followed the statutory terms—'resistance to its [the court's] lawful writ, process, order, rule, decree, or command'—by not limiting its application to an immediately outstanding precept. The anticipated final judgment was not considered to be presently beyond the contemplation of the statute. Indeed, the contrary is implicit in the opinion. The diversion of the res was held to be contumacious because it 'tended to defeat any *decree* which the court *might ultimately* make in the cause.' (Accent added.)

"Civil and not criminal contempt was the gravamen of Lamb v. Cramer and is here too. This was a predominant consideration of the Supreme Court and probably accounts for no advertence to the contempt statute, which seems worded more appropriately for criminal contempt. The omission means nothing, for the primary reasoning of the Court was that the res was in gremio legis and the conveyance of it in part was a disturbance of the constructive possession of the trial court. Whether the decision in Lamb v. Cramer was founded on this conception of judicial custody or on the statute, of which the Court was hardly unaware, is immaterial. Either ground supports our holding that the Board of Supervisors was in contempt.

"The present case is quite different factually from Berry v. Midtown Service Corp., 104 F.2d 107, 122 A.L.R. 1341 (2 Cir. 1939), relied upon by the Board. There the subject-matter disposed of pending appeal was the leviable assets of the judgment debtor-appellant. The Court distinguished that case from ours when it said that the appeal was not 'defeated or impaired' by the defendant's assignment. Further distinction is found in its observation that the suit 'was not concerned with any specific property', the judgment on appeal merely establishing a general, personal, financial liability. [5]

"In our case the disbursement of the moneys seriously impaired the appeal. The suit and the appeal were directed to a specific subject, the Board's right to apply to a certain purpose moneys within its power. The Board assumed the right in utter and wilful disregard of this court's views. As was said in Merrimack River Savings Bank v. Clay Center, supra, 219 U.S. 527, 535, 31 S.Ct. 295, and again in Lamb v. Cramer, supra, 285 U.S. 217, 52 S.Ct. 315, such conduct constituted contempt although not formally and explicitly under the injunction.

"We find the Board of Supervisors and its members guilty of civil contempt. Accordingly, the Board and

its constituent individuals, . . . will be ordered jointly and severally to restore to the County Treasurer of Prince Edward County, through recapture or otherwise, an amount equal to the disbursements authorized and made by their resolutions . . . ."

II In This Case The Court Has the Right and Power to Make Orders to Preserve The Status Quo, Irrespective of The Merits As They May Be Ultimately Decided

Where, as here, the defendants have notice of a suit brought to enjoin certain acts, the hands of the defendants are tied even though no injunction be issued, and they act at their peril and subject to the power of the Court to restore the *status quo, wholly irrespective of the merits as they may be ultimately decided.* This is the doctrine of *Jones v. Securities and Exchange Commission,* 298 U.S. 1, 80 L.Ed. 1015 (1936). In that case the Supreme Court said (298 U.S. 15-18, 81 L.Ed. 1020-1022): [6]

". . . The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example, the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued. We briefly review some of the decisions.

"In Daniel v. Ferguson [1891] 2 Ch. 27—C.A., suit had been brought to restrain defendant from building so as to darken plaintiff's lights. Notice of motion for a temporary injunction to be made upon a designated future day was served on the defendant. After receiving notice, the defendant put on a large number of men and proceeded with his building, running a wall up to a height of about 39 feet from the ground before the injunction was granted. The court, without regard

to the ultimate rights of the parties, held that the wall thus run up by defendant should be torn down at once, as an attempt to anticipate the order of the court. A like situation was presented in Von Joel v. Hornsey [1895] 2 Ch. 774—C.A. In that case, the evidence showed that defendant had repeatedly evaded attempts to serve him with process, and in the meantime had gone on with the building. Again, without regard to the ultimate rights of the parties, the court directed defendant to pull down that part of the building thus erected.

"The Supreme Court of Pennsylvania in several cases has followed the same rule. Clark v. Martin, 49 Pa. 289, 298, 299; Easton, S.E. & W. E. Pass. R. Co. v. Easton, 133 Pa. 505, 519, 19 A. 486; Cooke v. Boynton, 135 Pa. 102, 19 A. 944; Meigs v. Milligan, 177 Pa. 66, 72, 76; 35 A. 600; Fredericks v. Huber, 180 Pa. 572, 575, 37 A. 90. In Cooke v. Boynton, a bill in equity had been filed praying for a preliminary and perpetual injunction preventing defendants from interfering with a certain tramway of the plaintiff. Before a preliminary injunction was obtained, the defendants, on three separate occasions [7] had torn up the track which the plaintiffs had replaced. The third incident occurred while plaintiff was obtaining a preliminary injunction. The court said, 'The writ was served just as they had finished the work of demolition, and this coincidence is strongly suggestive of a race against the law.' The trial court had dissolved the injunction, in part on the ground that the act sought to be restrained had already been done, and that it was without power at that stage of the cause to restore the property to its former condition by mandatory injunction. The supreme court reversed. 'What we did in the Easton Case,' the court said, 135 Pa. p. 110, 19 A. 944, 'we will do here. We will restore the injunction without passing upon the merits of the case. They will be considered when it comes here upon final hearing.'

"In New Haven Clock Co. v. Kochersperger, 175 Ill. 383, 51 N. E. 629, the state supreme court held that the forced payment of a tax after the court has acquired jurisdiction of a bill to enjoin its collection may be restored by the court, even though no preliminary injunction was granted; and that such payment cannot be availed of as a defense upon the ground that the tax having been paid there is nothing to enjoin. The same court in Turney v. Shriver, 269 Ill. 164, 172, 109 N. E. 708, held the rule to be that 'where a bill for injunction has been filed and the court has acquired jurisdiction of both the person and the subject matter of the suit and the defendant does any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status. . . .' See also Konig v. Baltimore, 126 Md. 606, 627, 95 A. 478.

"The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly [8] irrespective of the merits as they may be ultimately decided. 1 High, Inj. 4th ed. § 5(a)."

On the basis of the foregoing, it is submitted that this Court may properly grant the remedial orders sought by Plaintiff-Appellant.

See also:

National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (9 Cir. 1973);

People of Saipan v. United States Department of Interior, 502 F.2d 90, 100 (9 Cir. 1974), cert. den. 420 U.S. 1003.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY

By WILLIAM M. BRINTON

Dated: September 27, 1979. [9]

Appendix Q

Filed Oct 26 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants-Appellees.

ORDER DENYING
CONTEMPT JUDGMENT

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The court has considered the motion of plaintiff-appellant for judgment of civil contempt, filed September 27, 1979, together with the responses. The motion has no merit and is denied.

Appendix R

Filed Oct 26 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants-Appellees.

ORDER CORRECTING OPINION

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The opinion heretofore filed on July 24, 1979 is corrected as follows:

The third full paragraph in column 1, page 2968 of the opinion as printed should be corrected to read:

> Although antitrust violations were not involved in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that case presents an analogous situation. The question there was whether citizens of one town had standing to complain of the zoning practices of a

neighboring town which tended to discourage the development of low income and minority residences. The Court stated that....

The clerk will make the correction on the original copy of the opinion on file.

Appendix S

Received/Counter
Richard H. Deane
Clerk, U.S.C.A.
1979 Oct 29 P.M. 3:38
Filed
Docketed .....

Docketed .....
Date ..... Initial .....

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR STAY OF MANDATE

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Tel: (415) 397-4600
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In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR STAY OF MANDATE

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT:

Plaintiff-Appellant respectfully presents this its application for, and moves the Court to enter, an order staying the issuance of mandate in this case under the provisions of 28 U.S.C. 2101(f), and pursuant to Rule 41(b) of Federal Rules of Appellate Procedure, on the ground and for the reason that Plaintiff-Appellant expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the [1] United States for a review on-writ of certiorari of the decision and judgment rendered in favor of Defendants-Appellees and against Plaintiff-Appellant in this cause.

On October 26, 1979, the following orders of this Court were filed in the office of the Clerk:

1. Order denying petition for rehearing and rejecting suggestion for a rehearing en banc;
2. Order correcting second opinion;
3. Order denying motion for civil contempt judgment.

WHEREFORE, Plaintiff-Appellant moves the Court for an order staying the issuance of mandate herein pending the filing by it of a petition for certiorari in the Supreme Court and until the final disposition therein of this cause.

There is attached hereto in support of this motion the certificate of one of the attorneys for Plaintiff-Appellant.

Respectfully submitted,
WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By WILLIAM M. BRINTON

Dated: October 29th, 1979. [2]

CERTIFICATE OF COUNSEL

I am and have been ever since November 19, 1974, the date on which this action was filed in the United States District Court, Northern District of California, one of the attorneys of record for Plaintiff-Appellant, and as such I am entirely familiar with the facts and law involved in the action.

I hereby certify that it is the bona fide intention of Plaintiff-Appellant to make timely application to the Supreme Court of the United States for a writ of certiorari within the time provided by law. I also certify that I believe that there is merit in Plaintiff-Appellant's case, and that the judgment of the United States Court of Appeals, Ninth Circuit, should be reversed by the Supreme Court.

I hereby further certify that this motion for a stay of mandate is not filed merely for delay.

Dated: October 29th, 1979.

WILLIAM M. BRINTON [3]

Appendix T

Filed Nov 7 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit
No. 77-1017
DC CV 74-2429 WWS

City of Rohnert Park, a municipal, corporation,
Plaintiff/Appellant,

vs.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Defendants/Appellees.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of William M. Brinton, Esq. counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before November 30, 1979.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

EUGENE A. WRIGHT
United States Circuit Judge.
Judge Wright

DATED: San Francisco, Calif.

Appendix U

Filed Nov 9 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

The United States Court of Appeals
For the Ninth Circuit
No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

vs.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

ORDER RECALLING STAY OF MANDATE

Before: WRIGHT, Circuit Judge

On November 7, 1979, there was filed an Order Staying Issuance of Mandate. Prior thereto, on November 5, there were filed but not yet forwarded to the panel the Objection of appellee Hahn and the Response of other appellees. The court having considered those responses,

IT IS ORDERED that the Order Staying Mandate be recalled and that the plaintiff-appellant have seven days within which to reply to the objections and to comment on the request that a substantial bond be required as a condition of a stay of mandate.

WILL WRIGHT
United States Circuit Judge

November 9, 1979

Appendix V

In the United States Court of Appeals
For the Ninth Circuit
No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

REPLY TO OBJECTIONS BY APPELLEES ERNEST W. HAHN, INC., CITY OF SANTA ROSA AND ITS URBAN RENEWAL AGENCY TO MOTION OF APPELLANT CITY OF ROHNERT PARK FOR A STAY OF MANDATE

On October 26, 1979, this Court denied Appellant's petition for rehearing and Appellant's suggestion for a rehearing in banc. On October 29, 1979, Appellant filed and served a motion for stay of mandate. Pursuant to said motion and on November 7, 1979, this Court made and entered an order staying issuance of mandate.

On or about November 2, 1979, Appellees Ernest W. Hahn, Inc., City of Santa Rosa, and Urban Renewal Agency of Santa Rosa served and presumably filed by mail objections [1] and response to Appellant's motion for a stay of mandate. These objections and this response included the affidavits of John M. Gilchrist and James K. Burns. Following the filing of said objections and response, and on November 9, 1979, this Court made and entered its

order recalling stay of mandate which, *inter alia,* grants Appellant "seven days within which to reply to the objections and to comment on the request that a substantial bond be required as a condition of a stay of mandate."

In their objections to Plaintiff-Appellant's Motion For Stay of Mandate, Defendants-Appellees Ernest W. Hahn, Inc., City of Santa Rosa and its Urban Renewal Agency, Appellee Hahn stated in part that ". . . such a stay may cause Appellee Ernest W. Hahn, Inc. irreparable injury by causing cancellation of the development and construction of the Santa Rosa Center Urban Renewal Project Regional Shopping Center...." As part of its objection, Appellee included an Affidavit of John M. Gilchrist, Senior Vice President, Development Division, of Appellee Ernest W. Hahn, Inc. The Gilchrist Affidavit claimed under oath, in part, that:

> "12. Any significant construction of the proposed Regional Shopping Center cannot take place until elimination of Notice of Pendency of this action from the aforesaid pro forma policy of title insurance."[2]

Notwithstanding this demonstrably false statement, Appellee Ernest W. Hahn, Inc., beginning in June, 1978, even before oral argument in this proceeding on December 4, 1978, began planning for and carrying out the construction of the 161,342 square foot department store for Sears Roebuck & Co., one of its partners in the Santa Rosa Mall project. See page 6 of Exhibit 6 to Deposition of Ernest W. Hahn and pages 2-5 of "Affidavit of John D. Flitner, Rohnert Park City Attorney," attached hereto and incorporated by reference. See also Exhibit K to Appellant's Motion For Judgment For Civil Contempt in which Appellee HUD, in a letter dated July 31, 1979 and addressed to James K. Burns, stated in part: ". . . We congratulate

you on coming another step closer to both physical completion of the project and financial settlement of the outstanding Project Temporary Loan."

Building Permit No. 6113 was issued to Sears Roebuck & Co. Owner on June 27, *1978*. It covered the main department store with an assigned value of $4,417,500. The contractor was and continues to be Ernest W. Hahn, Inc. What Mr. Gilchrist means by "significant construction" is unclear, but the Sears department store represents about 19% of the total project of 835,525 square feet. The entire Santa Rosa Mall is scheduled to open in "Spring 1981." See p. 14 of the Form 10-K filed [3] by Ernest W. Hahn, Inc. on May 29, 1979, with the Securities and Exchange Commission (SEC). It is believed that the Sears department store, a major component of the Santa Rosa Mall, will open in March of 1980. The cover page of said Form 10-K and pages 14 and 41 are attached hereto and incorporated by reference. Appellant requests that this Court take judicial notice of the same under the provisions of Section 201(d), Federal Rules of Evidence. It was filed on May 29, 1979, *seven days after* Appellant filed and served its Petition For Rehearing Under Rule 40, and Suggestion of Hearing In Banc Under Rule 35, Federal Rules of Appellate Procedure. Said petition was not determined by this Court until July 24, 1979. Page 41 of the Form 10-K states in part as follows:

> "Previously described litigation affecting Santa Rosa Mall (this proceeding, *inter alia*) has been resolved in favor of the Company...."

The quoted paragraph from said Form 10-K was correct as of May 9, 1979, but by May 29, 1979, Ernest W. Hahn, Inc. had constructive, if not actual knowledge of Appellant's petition filed on May 22, 1979. Accordingly, the quoted para-

graph is the assertion of a fact, of that which is not true, by one who has no reasonable grounds for believing it to be true. Additionally, it does not mention two other unresolved and pending cases as follows, both of which, if relief [4] is granted as prayed for, will have a substantial adverse effect on the Santa Rosa Mall Project: *Codding Enterprises, et al. v. Urban Renewal Agency of the City of Santa Rosa, et al.,* Nos. 79465, 79762, 84237, 81799 in the Superior Court in and for the County of Sonoma, and *Coalition for a Sensible Downtown Plan, etc., et al. v. The City of Santa Rosa, a municipal corporation and the Redevelopment Agency of the City of Santa Rosa, et al.,* No. 99840 in the Superior Court in and for the County of Sonoma. Nowhere does the Form 10-K mention that cross-appeals in an antitrust action are now pending in this Court—see No. 77-2465 Companion to No. 77-2474. Ernest W. Hahn, Inc. is both plaintiff and defendant in these actions, and one of them involved alleged violations of the Sherman Act by Ernest W. Hahn, Inc. in connection with the Santa Rosa Mall Project.

Notwithstanding, Appellee Ernest W. Hahn, Inc. now claims it is faced with the possible ". . . cancellation of the development and construction of the . . ." Santa Rosa Mall shopping center project. In fact, however, said Appellee could have moved at any time after October 13, 1978 (date lis pendens was filed) to expunge the same. The possibility of doing so was mentioned in open court on December 4, 1978, the date of oral argument in this proceeding. It is now too late in the [5] day for Ernest W. Hahn, Inc. to say that no "significant construction" can take place with the lis pendens still of record. See pages 3-4 of Objections by Ernest W. Hahn, Inc.

It is quite clear from the record in this proceeding that Appellee Ernest W. Hahn, Inc. and the Santa Rosa Appellees independently of any action by this Court, have gone forward with significant construction as part of the Santa Rosa Mall project. Ernest W. Hahn, Inc. purchased ". . . a portion of the Phase II land in December 1978 . . ." even though title was subject to two lis pendens and the Agency was technically and legally not in a position to convey clear title to the land as required by the Hahn contract. See Exhibit A to Appellant's Motion for Judgment for Civil Contempt—letter dated January 15, 1979, from James K. Burns to Robert L. Cunningham, Appellee HUD's Acting Area Manager, requesting a waiver of Section 106(e) of the Loan and Grant Contract to permit conveyance of the land in advance of cash payment by Appellee Ernest W. Hahn, Inc.

It is equally clear that Appellees intend to and will proceed with construction of the Santa Rosa Mall even though this Court does issue a stay of its writ of mandate. Private contractual and financial commitments amongst Appellees and finance institutions made during the pendency of [6] this and other proceedings now require Ernest W. Hahn, Inc. to proceed with construction under any and all circumstances.

Said Appellee Hahn, in going forward with substantial construction of a major component of the Santa Rosa Mall and making other related commitments, has acted at its own peril. *Jones v. S.E.C.* (1936) 298 U.S. 1, 56, 80 L.Ed. 1015, cited with approval by this Court in *People of Saipan v. United States Department of the Interior* (C.A. 9) 502 F.2d 90, 100 (1974). On page 90, this Court, quoting with approval from *Jones v. S.E.C.*, supra, stated in part:

> ". . . [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him (the precise relief requested by Appellant in this pro-

ceeding), even though a temporary injunction be not granted, *he acts at his peril* and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided . . . ." (Citations omitted and emphasis added . . . ."

Rule 41(b), Federal Rules of Appellate Procedure, state in part: ". . . A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate." Use of the word "may" suggests that the Court has discretion to condition stay of mandate upon a bond posted by Appellant, or not to require a bond at all.

It is Appellant's contention that Appellee Ernest W. Hahn, Inc., acting by counsel, has filed its objections [7] containing false statements of fact for the purpose of misleading this Court. Counsel for Ernest W. Hahn, Inc. must be presumed to know that (1) his client was required by law to file a Form 10-K, (2) it was filed and (3) the Appellant had filed or could file a petition for rehearing. Moreover, it has done so with knowledge that the same are false. See California Business & Professions Code, Sec. 6068(d), providing in part that:

"It is the duty of an attorney:

. . .

(d) . . ., and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. . . . ."

Counsel for Appellant has been unable to find any case in which a request for bond under Rule 41(b), Federal Rules of Appellate Procedure has been denied for violation of a duty owed the court. However, compare *Frausto v. Legal Aid Society of San Diego, Inc.* (C.A. 9) 563 F.2d 1324, 1327 (1977), particularly footnote 8 on page 1327. There, this Court stated in part:

". . . It is appellate counsel's professional duty to be scrupulously accurate in referring to the record and the authorities upon which he relies in his presentation to the court in his brief or oral argument. He must not mislead the court by misrepresenting the record. . . . ." (Citation omitted.) [8]

The attention of this Court is also called to the "affidavit of James K. Burns In Response to Motion For Stay of Mandate." In paragraph 5 thereof, he stated in part: ". . . A title insurance report prepared in connection with the conveyance of the shopping center property from the Agency to Hahn discloses that plaintiff-appellant has recorded a lis pendens based on this lawsuit. . . . ." This leaves the misleading impression that the Santa Rosa Appellees discovered the lis pendens only after obtaining a policy of title insurance. In fact, said lis pendens was filed on October 13, *1978,* and counsel for the Santa Rosa Appellees knew it on or about the same date. Counsel discussed expunging said lis pendens in open court on December 4, 1978, the date of oral argument in this proceeding. However, it was not until November 2, 1979, that counsel for the Santa Rosa Appellees asked for relief by way of expunging said lis pendens.

Moreover, Burn's wholly conclusory estimate of the cost of delay (See paragraph 10, pp. 5-6 of Burns Affidavit of November 2, 1979), is without evidentiary support, and he offers nothing which would qualify him as an expert witness. Nor has he been so brash as to say that, if called as a witness, he could testify competently to the matters stated in his affidavit. Cf. Rule 56(e), Federal Rules of Civil Procedure. [9]

In fact, Mr. Burn's sworn affidavit is in direct conflict with testimony of the Mayor of Santa Rosa. In *Codding Enterprises et al. v. Urban Renewal Agency of the City*

of Santa Rosa, et al., supra, the deposition of a Mr. Healy, the Mayor of Santa Rosa was taken under oath on August 2, 1979. In said deposition, the following exchange occurred on pp. 8-9 (Appellant requests this Court to take judicial notice thereof under Section 201(d), Federal Rules of Evidence:

> "Q. Has anyone ever told you that the City of Santa Rosa is currently losing any money because of any delay on the shopping center?
>
> A. (by Mr. Healy) Well, I've already said there is no delay as for today so I suppose the rest would follow.
>
> Q. Your answer is the city, to your knowledge, has not been losing any money?
>
> A. There is no delay so they couldn't lose any money because of that."

Although Mr. Healy may have limited his answers to the proceeding in which his deposition was taken, it seems clear that any alleged delay arising out of the lis pendens of October, 1978, is simply non-existent and without cost to Appellee City of Santa Rosa. It should be noted that counsel for the Santa Rosa Appellees was present at Mr. Healy's deposition, and must be charged with actual knowledge of the above-quoted exchange. The same counsel prepared objections [10] (containing the Burns Affidavit), to Appellant's Motion For Stay of Mandate.

Appellant respectfully submits that while no case can be found expressly so holding, Appellees are not entitled to a bond as a condition that this Court issue its order staying a writ of mandate. Instead of moving to expunge the aforesaid lis pendens, Appellees were engaged in a concerted and determined effort to "moot" this proceeding by placing the land and the Sears department store now almost completed thereon beyond the reach of this Court. See 18 U.S.C. 401(3).

For all the foregoing reasons, Appellant City of Rohnert Park moves this Court for relief as follows:

1. That it issue its order staying the writ of mandate in this proceeding;
2. That Appellant be given thirty (30) days from the entry of said order within which to file its petition for writ of certiorari in the Supreme Court of the United States;
3. That this Court overrule all objections to Appellant's Motion For Stay of Mandate;
4. That this Court reconsider Appellant's Motion For Judgment of Civil Contempt; and [11]
5. For such other and further relief as this Court deems appropriate in the premises.

Dated: November 16, 1979.

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY

By WILLIAM M. BRINTON [12]

In the United States Court of Appeal
For the Ninth Circuit

Case No. 77-1017

City of Rohnert Park, A Municipal Corporation,
Plaintiff and Appellant

vs.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development
Defendant and Respondent.

AFFIDAVIT OF JOHN D. FLITNER, ROHNERT PARK CITY ATTORNEY

JOHN D. FLITNER, of lawful age, deposes and says:

I am City Attorney for the City of Rohnert Park and have acted in that capacity since January, 1974. I reside in Sonoma County, near Santa Rosa, California, and my offices are in Santa Rosa, California. I have had occasion to view the site upon which Sears Roebuck and Company is constructing its new retail store, since construction was commenced on the site which is located within the Redevelopment Area of the City of Santa Rosa and which is part of the subject matter of the within [1] lawsuit. I pass by the site nearly every week on Third Street, which passes through the Redevelopment Area, or Fourth and Fifth Streets which formerly passed through the Redevelopment Area until they were closed within the last 30 or 60 days, respectively. By way of explanation, Fifth Street was closed some time after the middle of September, 1979, and Fourth Street was closed on or about the end of October, 1979. Both streets have now been torn up and demolished and are in the process of being integrated into the development plan for the Redevelopment Area.

I have observed construction at the Sears store commencing on or about the beginning of the construction season for 1979 and continuing forward thereafter. I have seen cranes at the site. I have seen forms erected for the pouring of concrete. I have seen the building being faced with brick and I have observed the roof and other outside material being applied. Attached hereto marked Exhibits 1-9, inclusive, are exhibits which relate to the issuance of permits for the Sears building or the Sears Tires, Batteries and Auto Service Center, which are explained as best I understand them, as follows:

1. Exhibit "1" is, so far as I can determine, the building, electrical, mechanical, plumbing, grading and encroachment permit for a new commercial building known as the Sears Retail Sales Building located within the Redevelopment Area. The owner is Sears, Roebuck and Co. and the contractor is Ernest W. Hahn, Inc. The permit was applied for on or about May 19, 1978 and [2] was issued on or about June 27, 1978.

2. Exhibits "2" and "3" are the front and back side of what I understand to be the worksheet utilized by the Building Department in conducting inspections on the Sears Retail Sales Building in the field. If one looks at Exhibit "3", one will note notations regarding the footings bearing such dates as October 18, 1978, October 20, 1978, October 25, 1978 and October 31, 1978. Alongside these dates are the initials of the inspector involved. There are other notations on Exhibit "3" indicating when the electrical was placed under the slab, when the main line plumbing was installed (10-28-78), when the underground electrical was installed for certain locations (2-27-79), and when other items within the inspection process were completed.

3. Exhibit "4" is the building, electrical, mechanical, plumbing and grading permit for a new commercial auto center store, tires and batteries and other accessories which was applied for on or about June 29, 1978. No date is shown as to when the permit was issued. Presumably, the permit would have been issued on or about the date the plan was received, which was indicated on Exhibit "4" as "1/1/79".

4. Exhibits "5" and "6" are the front and rear sides of the building inspector's work card and bear notations similar to Exhibits "2" and "3", only the dates are different. For example, underground electrical was inspected on

March 7, 1979 and the outside lath [3] was apparently inspected on August 23, 1979.

5. Exhibit "7" is a grading permit for the final site work for the Sears building. It was applied for on August 28, 1979, and was apparently issued on October 4, 1979.

6. Exhibits "8" and "9" are documents entitled *"RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT"* which were given by Ernest W. Hahn, Inc. or representatives of that company to the City of Santa Rosa. The two documents attached bear dates of June 27, and June 29, 1979.

Based on my observations of the activities of Ernest W. Hahn, Inc., and the Redevelopment Agency of the City of Santa Rosa and of the City of Santa Rosa, if at all involved in the construction work, these entities have not ceased the erection of the Sears building since the permit was issued and have continued as weather conditions would permit, to erect the building.

In addition to the foregoing I am involved in litigation presently on file in the Sonoma County Superior Court entitled Coalition for a Sensible Downtown Plan, etc., et al, plaintiffs vs. The City of Santa Rosa, a Municipal Corporation and the Redevelopment Agency of the City of Santa Rosa, et al, defendants, bearing Civil Action No. 99840. This action has been pending since October 18, 1978, and seeks to enjoin the defendants from closing Fourth and Fifth Streets at the boundaries of the project area. A Temporary Restraining Order [4] was issued in the case which was subsequently dissolved. The defendants have continued to work or to authorize work in the area of the streets to implement the plan in the face of the litigation and in the face of traffic studies which indicate that traffic levels will rise to D, E or F levels within the foreseeable future. The

apparent attitude of the defendants in that litigation is to proceed with the project as quickly as possible regardless of the consequences.

Dated at Santa Rosa, California, this 12 day of November, 1979.

JOHN D. FLITNER
John D. Flitner

State of California }
County of Sonoma } ss.

On November 12, 1979, before me, the undersigned, a Notary Public in and for said County and State, personally appeared John D. Flitner known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Notary's Signature LESLIE Q. HOLT

Official Seal
LESLIE Q. HOLT
Notary Public—California
Principal Office in
Sonoma County
My Commission Expires Jan. 27, 1981

General Acknowledgment
Form No. 16 [5]

TO APPLICANT: hand corner of the form before submitting.

city of santa rosa - PERMIT -

COMMUNITY DEVELOPMENT Department of

- BUILDING
- ELECTRICAL
- MECHANICAL
- PLUMBING
- GRADING
- ENCROACHMENT
- NEW / SFD
- ADDN / DUPLEX
- ALTER / APT.
- REPAIR / COMM.

PERMIT NO. 6113

JOB ADDRESS 100 Santa Rosa Center (100 ~~Fulton~~ Santa Rosa Center) LOT

OWNER: Sears, Roebuck & Co. — ADDRESS: 900 S. Fremont Ave., Alhambra, Ca. 91802 — TELEPHONE: 213 576-4802

CONTRACTOR: Ernest W. Hahn, Inc. — ADDRESS: 200 Continental Blvd, El Segundo, Ca. 90245 — TELEPHONE: 213 772-4200

CITY BUSINESS LIC.#: 41983 — STATE LIC.#: B159056 — ARCH./BLD. DESIGNER: Robert Clements and Associates — TELEPHONE: 213 627-0873

ENGINEER: Johnson & Nielsen — TELEPHONE: 213 256-2237 — LENDER: — APN: 10-062-21, 10-065-17

FLOOR AREA	VALUATION	GROUP	MAX. OCC.	TYPE
142,500 Gross	$1,417,500			
		FIRE ZONE	STORIES	BEDROOMS
	ZONING	USE PERMIT	DESIGN REVIEW	UBC ED.

PROPOSED WORK/REMARKS: Permit Fee subject to verification of contract price. RETAIL SALES BLDG.

NOTICE
Sewer connection and/or occupancy for this project may not be allowed until further notice due to action of the No. Coast Regional Water Quality Control Board.

MINIMUM OF 24 HOUR NOTICE FOR INSPECTION — CALL 528-5201

TYPE OF INSPECTION	DATE	INSPECTOR	TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION			GAS SERVICE		
UNDERFLOOR/SLAB ELEC.			SEWER SERVICE		
UNDERFLOOR/SLAB MECH.			ELECTRICAL SERVICE		
UNDERFLOOR/SLAB PLUMB.			GAS APPLIANCE		
UNDERFLOOR					
ELECTRIC ROUGH					
MECHANICAL ROUGH					
PLUMBING ROUGH			ELECTRICAL FINAL		
FRAME ROUGH			PLUMBING FINAL		
LATH OUTSIDE			MECHANICAL FINAL		
INSULATION			BUILDING FINAL		
WALLBOARD			GRADING FINAL		
MASONRY/FIREPLACE			CERTIFICATE OF OCCUPANCY		

READ AND COMPLETE STATEMENT ON THE BACK OF THIS PAGE BEFORE SIGNING

I hereby certify and agree that all Ordinances of the City of Santa Rosa and the State of California will be complied with whether herein stated or not.

X _____ APPLICANT'S SIGNATURE

PLAN CHECK FEE $2551.88	DATE 5/19/1978	RECEIPT # 29408	DATE PLAN RECEIVED 4-10-1978 (5-15-78) PLAN RECEIVED BY: WE
ADD'L PLAN CHECK FEE $ 856.76	DATE / / 19	RECEIPT #	☑ WORKER'S COMP. CERT. FILED. EXPIR. DATE 1/1/1979
PERMIT FEE $4600.50	DATE 10376 6/27/78	RECEIPT # 29899	PERMIT FEE INCLUDES SEISMIC, MICROFILM AND OTHER FEES AUTHORIZED BY CITY ORDINANCE.
TOTAL FEE $ 7.655.64 EXHIBIT 4			DIRECTOR COMMUNITY DEVELOPMENT BY: X _____ DATE 6-27-78

city of santa rosa - PERMIT -

INSPECTORS WORK SHEET

- BUILDING
- ELECTRICAL
- MECHANICAL
- PLUMBING
- GRADING
- ENCROACHMENT
- NEW / SFD
- ADDN / DUPLEX
- ALTER / APT.
- REPAIR / COMM.

PERMIT NO. 11?

JOB ADDRESS 100 Santa Rosa Ctr. (Mall) — SUBDIVISION — LOT

OWNER: Sears, Roebuck & Co. — ADDRESS: 900 S. Fremont Ave. Alhambra, Ca. 91802 — TELEPHONE: 213 576-4[illegible]7

CONTRACTOR: Ernest W. Hahn, Inc. — ADDRESS: 200 Continental Blvd. El Segundo, Ca. 90245 — TELEPHONE: 213 772-4200

CITY BUSINESS LIC.#: 41[illegible] — STATE LIC.#: [illegible] — ARCH./BLD. DESIGNER: Robert Clements and Associates — TELEPHONE: 213 627-0873

ENGINEER: Johnson & Nielsen — TELEPHONE: 213 256-2237 — LENDER: — APN: 10-[illegible]

FLOOR AREA	VALUATION	GROUP	MAX. OCC.	TYPE
14[illegible]	[illegible]	V-2	1	I
		FIRE ZONE 1	STORIES	BEDROOMS
	ZONING C-2	USE PERMIT	DESIGN REVIEW	UBC ED. 3

PROPOSED WORK/REMARKS: [illegible]

6-27-78

EXHIBIT 4

TYPE OF INSPECTION	DATE	INSPECTION
FOUNDATION		
UNDERFLOOR/SLAB ELEC.		
UNDERFLOOR/SLAB MECH.		
UNDERFLOOR/SLAB PLUMB.		
UNDERFLOOR		
ELECTRICAL ROUGH		
MECHANICAL ROUGH		
PLUMBING ROUGH		
FRAME ROUGH		
LATH OUTSIDE		
INSULATION		
WALLBOARD		
MASONRY/FIREPLACE		
GAS SERVICE	5/25/79	GB
SEWER SERVICE		
ELECTRICAL SERVICE		
GAS APPLIANCE		
ELECTRICAL FINAL		
PLUMBING FINAL		
MECHANICAL FINAL		
BUILDING FINAL		
GRADING FINAL		
CERTIFICATE OF OCCUPANCY		

Partial Footing Inspection #1 at Submerger Electric Elec. Insp. Req. abg

10/13/78 abg

10/26/78 abg

10/31/78 GB

11/1/78 Elec. underslab North Hall abg

11/1/78 GB

11/1/78 Mech. underslab Roof abg

11/1/78 Plbg. underslab Roof abg

11/9/78 Elec. pit walls Beams across Telephone line trenches GB

11/9/78 Plbg. Roof

12/4/78 RTSwell

12/13/78 Elec. underground final GB

EXHIBIT 3

city of santa rosa - PERMIT -

department of COMMUNITY DEVELOPMENT

- [X] BUILDING
- [X] ELECTRICAL
- [X] MECHANICAL
- [X] PLUMBING
- [X] GRADING
- [X] ENCROACHMENT
- [X] NEW [ ] SFD
- [ ] ADDN [ ] DUPLEX
- [ ] ALTER [ ] APT.
- [ ] REPAIR [X] COMM.

JOB ADDRESS: 60 Santa Rosa Ctr | SUBDIVISION | LOT

OWNER: Sears, Roebuck & Co | ADDRESS: 990 S. Fremont Ave Alhambra, Ca. 91803 | TELEPHONE: 213 576-4[illegible]

CONTRACTOR: Ernest W. Hahn Inc. | ADDRESS: 200 Continental Blvd. El Segundo Ca 90245 | TELEPHONE: 213 772-4200

CITY BUSINESS LIC. #: 4183 | STATE LIC. #: 159056 | ARCH./REGISTERED: Robert Clemente & Assoc. | TELEPHONE: 213 627-0873

ENGINEER: Johnson/Wilson | TELEPHONE: 213 256-2237 | LENDER | APN

PERMIT NO.: 6164 | FLOOR AREA | VALUATION: $ 431,000 | GROUP | FIRE ZONE | ZONING | USE PERMIT | DES. REVIEW | UBC ED. | MAX. OCC. | STORIES | TYPE | BEDROOMS

PROPOSED WORK/REMARKS: Auto Ctr Store CTBA

NOTICE: Sewer connection and/or occupancy for this project will not be allowed until further notice due to action of the No. Coast Regional Water Quality Control Board.

MINIMUM OF 24 HOUR NOTICE FOR INSPECTION — CALL 528-5201

TYPE OF INSPECTION	DATE	INSPECTOR	TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION			GAS SERVICE		
UNDERFLOOR/SLAB ELEC.			SEWER SERVICE		
UNDERFLOOR/SLAB MECH.			ELECTRICAL SERVICE		
UNDERFLOOR/SLAB PLUMB.			GAS APPLIANCE		
UNDERFLOOR					
ELECTRIC ROUGH					
MECHANICAL ROUGH					
PLUMBING ROUGH			ELECTRICAL FINAL		
FRAME ROUGH			PLUMBING FINAL		
LATH OUTSIDE			MECHANICAL FINAL		
INSULATION			BUILDING FINAL		
WALLBOARD			GRADING FINAL		
MASONRY/FIREPLACE			CERTIFICATE OF OCCUPANCY		

READ AND COMPLETE STATEMENT ON THE BACK OF THIS PAGE BEFORE SIGNING

I hereby certify and agree that all Ordinances of the City of Santa Rosa and the State of California will be complied with whether herein stated or not.

x E.W. Hahn Jr
APPLICANT'S SIGNATURE

PLAN CHECK FEE $ 418.13	DATE 6 29 78	RECEIPT # 29949	DATE PLAN RECEIVED 11 1 1979 — PLAN RECEIVED BY: dh
ADD'L PLAN CHECK FEE $ 0	DATE	RECEIPT #	[X] WORKER'S COMP. CERT. FILED. EXPIR. DATE 1 1 1979
PERMIT FEE $ 836.26	DATE 6 29 1978	RECEIPT # B.P.V. 24611	PERMIT FEE INCLUDES SEISMIC, MICROFILM AND OTHER FEES AUTHORIZED BY CITY ORDINANCE.
TOTAL FEE $ 1254.39			DIRECTOR COMMUNITY DEVELOPMENT — DATE — BY: X per Bill Ryan

(REV. 10/77) GB

EXHIBIT 4

DEPARTMENT COPY

city of santa rosa - PERMIT -

INSPECTORS WORK SHEET

X BUILDING
X ELECTRICAL
X MECHANICAL
X PLUMBING
X GRADING
X ENCROACHMENT
X NEW SFD
ADDN DUPLEX
ALTER APT.
REPAIR COMM.

PERMIT NO. -4

JOB ADDRESS		SUBDIVISION	LOT
OWNER		ADDRESS	TELEPHONE
CONTRACTOR		ADDRESS	TELEPHONE
CITY BUSINESS LIC. #	STATE LIC. #	ARCH./BLD. DESIGNER	TELEPHONE
ENGINEER	TELEPHONE	LENDER	APN

FLOOR AREA	VALUATION	GROUP	MAX. OCC.	TYPE
		FIRE ZONE	STORIES	BEDROOMS
	ZONING	USE PERMIT	DESIGN REVIEW	UBC ED.

PROPOSED WORK/REMARKS:

6-29-78

EXHIBIT "5"

TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION		
UNDERFLOOR/SLAB ELEC.		
UNDERFLOOR/SLAB MECH.		
UNDERFLOOR/SLAB PLUMB.		
UNDERFLOOR		
ELECTRICAL ROUGH		
MECHANICAL ROUGH		
PLUMBING ROUGH		
FRAME ROUGH	8-23-78	
LATH OUTSIDE		
INSULATION		
WALLBOARD		
MASONRY/FIREPLACE		
GAS SERVICE		
SEWER SERVICE		
ELECTRICAL SERVICE		
GAS APPLIANCE		
ELECTRICAL FINAL		
PLUMBING FINAL		
MECHANICAL FINAL		
BUILDING FINAL		
GRADING FINAL		
CERTIFICATE OF OCCUPANCY		

west wall foundation 3/9/79 okay
[illegible] 3/13/79 okay
underground electrical 3/15/79 okay
[illegible] 3/15/79 okay

3/30/79 S.E. Corner
Near Stairs
Underslab R/E
BB

EXHIBIT "6"

city of santa rosa - PERMIT -

BUILDING
ELECTRICAL
MECHANICAL
PLUMBING
X GRADING
ENCROACHMENT
NEW SFD
ADDN DUPLEX
ALTER APT.
REPAIR X COMM.

JOB ADDRESS: 100 S.R. PLAZA — SUBDIVISION — LOT

OWNER: ERNEST W. HAHN, INC. — ADDRESS: P.O. Box 1116, S.R. — TELEPHONE: 523-2882

CONTRACTOR: ERNEST W. HAHN, INC. — ADDRESS: P.O. Box 1116, S.R. — TELEPHONE: 523-2882

CITY BUSINESS LIC.: 4983 — STATE LIC.: 159156 — ARCH./BLD. DESIGNER: Bolles & Assoc. — TELEPHONE: 421-3030

ENGINEER: Richard C. Jayson — TELEPHONE: 415-342 1515 — LENDER — A.P.N.: 10-069-01

PERMIT NO.: 10356

FLOOR AREA

VALUATION: ~~175,000~~ 542,418

GROUP — MAX. OCC. — TYPE

FIRE ZONE: 3 — STORIES — BEDROOMS

ZONING — USE PERMIT — DESIGN REVIEW — UBC ED. 76

PROPOSED WORK: REMARKS
Final Site work - Sewers
- ALL WORK TO BE UNDER DIRECTION OF SOILS ENGR.

NOTIFY THIS OFFICE 24 HOURS IN ADVANCE FOR INSPECTIONS

TYPE OF INSPECTION	DATE	INSPECTOR	TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION			GAS SERVICE		
UNDERFLOOR/SLAB ELEC.			SEWER SERVICE		
UNDERFLOOR/SLAB MECH			ELECTRICAL SERVICE		
UNDERFLOOR/SLAB PLUMB.			GAS APPLIANCE		
UNDERFLOOR					
ELECTRIC ROUGH					
MECHANICAL ROUGH					
PLUMBING ROUGH			ELECTRICAL FINAL		
FRAME ROUGH			PLUMBING FINAL		
LATH OUTSIDE			MECHANICAL FINAL		
INSULATION			BUILDING FINAL		
WALLBOARD			GRADING FINAL		
MASONRY/FIREPLACE			CERTIFICATE OF OCCUPANCY		

READ AND SIGN THE STATEMENT ON THE BACK OF THIS APPLICATION BEFORE SIGNING

I hereby certify and agree that all Ordinances of the City of Santa Rosa and the State of California will be complied with whether herein stated or not

X Ernest Taylor
APPLICANT'S SIGNATURE

PLAN CHECK FEE $ 226.13	DATE 5 25 1977	RECEIPT # 35110	DATE PLAN RECEIVED 5 25 1977 — PLAN RECEIVED BY: V.C
ADD'L PLAN CHECK FEE $ 226.13	DATE 19	RECEIPT # V	☐ WORKER'S COMP. CERT. FILED. EXPIR. DATE 3 / 1 1980
PERMIT FEE $ 1007.25	DATE 11 9 1977	RECEIPT # 35705	PERMIT FEE INCLUDES SEISMIC, MICROFILM AND OTHER FEES AUTHORIZED BY CITY ORDINANCE.
TOTAL FEE $ 1506.38			DIRECTOR COMMUNITY DEVELOPMENT BY X — DATE 11-4-77

(REV 10 77) 6x

EXHIBIT "X"

DEPARTMENT COPY

DEPARTMENT OF COMMUNITY DEVELOPMENT

RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT

In consideration of the matter set forth in the following paragraph and permission received from the City of Santa Rosa, its officers, agents and employees (hereinafter CITY), by Ernest W. Hahn, its officers, agents and employees (here-
(Applicant)
inafter INDEMNITOR), to conduct said activities, INDEMNITOR does hereby release, discharge, hold and save harmless the CITY from any and all liability, claims, or demands arising out of said activity of INDEMNITOR whether or not caused by negligence on the part of the CITY.

Description of activities:

INDEMNITOR hereby agrees in consideration of the CITY issuing a building permit prior to completion of plan check not to begin any work on the project covered by the building permit until the plan check has been completed and approved and a stamped set of plans has been released to INDEMNITOR by CITY. The subject building permit is void after 120 days from the date issued, unless INDEMNITOR has furnished written evidence, accepted in writing by CITY not later than the 120th day, that foundation constructed pursuant to the approved plans, for the subject project are physically in place. In the event that the building permit becomes void, a new building permit shall be required, including a new plan check, plan check fee, and building permit fee. The project shall be subject to any and all requirements which may be imposed by law at the time of the new permit application.

Should the CITY be joined or named as a party in any claim, suit, action or other legal proceedings, INDEMNI-

TOR hereby agrees to indemnify, hold harmless and defend or settle the same, paying all costs and expenses including attorney fees and reasonable defense incurred in connection therewith.

Signed at Santa Rosa, California, this 21st day of June, 1978.

? ? ? ? ? ?
200 Conteninaltal Blvd.
El Segundo, CA
Address

WITNESS: ROBERT G. DRIGGS
Address

APPROVED AS TO FORM
CITY ATTORNEY

BY .....

EXHIBIT "8"

RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT

In consideration of the matter set forth in the following paragraph and permission received from the City of Santa Rosa, its officers, agent and employees (hereinafter CITY), by Ernest W. Hahn Inc. its officers, agents and employees
Applicant
(hereinafter INDEMNITOR), to conduct said activities, INDEMNITOR does hereby release, discharge, hold and save harmless the CITY from any and all liability, claims, or demands arising out of said activity of INDEMNITOR whether or not caused by negligence on the part of the CITY.

Description of activities:
INDEMNITOR hereby agrees in consideration of the CITY issuing a building permit prior to completion

of plan check not to begin any work on the project covered by the building permit until the plan check has been completed and approved and a stamped set of plans has been released to INDEMNITOR by CITY. The subject building permit is void after 120 days from the date issued, unless INDEMNITOR has furnished written evidence, accepted in writing by CITY not later than the 120th day, that found constructed pursuant to the approved plans, for the subject project are physically in place. In the event that the building permit becomes void, a new building permit shall be required, including a new plan check, plan check fee, and building permit fee. The project shall be subject to any and all requirements which may be imposed by law at the time of the new permit application.

Should the CITY be joined or named as a party in any claim, suit, action or other legal proceedings, INDEMNITOR hereby agrees to indemnify, hold harmless and defend or settle the same, paying all costs and expenses including attorney fees and reasonable defense incurred in connection therewith.

Signed at Santa Rosa, California, this 29th day of June, 1978.

ERNEST W. HAHN, INC.
Signature of Applicant

Address

WITNESS: DONNA M. HELWIG
Address

APPROVED AS TO FORM
CITY ATTORNEY

BY .....

EXHIBIT "9"

Fee Received
May 29 1979
Office of Reports
Reproduction Services
Printed May 31 1979

E 811250
Securities and Exchange Commission
Washington, D. C. 20549
17914
Form 10-K

110

Annual Report Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934
For the Fiscal Year Ended February 28, 1979
Commission File Number 0-6040

ERNEST W. HAHN, INC.
(Exact name of registrant as specified in its charter)

California
(State or other jurisdiction of
incorporation or organization)

95-1897947
(I.R.S. Employer Identification No.)

200 Continental Boulevard, El Segundo, California 90245
(Address of principal executive offices) (Zip Code)

(213) 772-4200
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12 (g) of the Act:
Common Stock
$.66⅔ par value

The number of shares of the common stock of Ernest W. Hahn, Inc. outstanding as of February 28, 1979, was 4,828,119 shares.

Indicate by checkmark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

YES X NO

Regional Shopping Centers Under Construction. The following table sets forth information with respect to regional shopping centers being developed by the Company which were under construction as of May 15, 1979:

REGIONAL CENTERS UNDER CONSTRUCTION

Name	Location	Estimated Completion Date	Company's Equity Interest
Carolina East	Greenville, NC	Summer 1979	100 %
Prestonwood Town Center	Dallas, TX	Summer 1979	100 %
Westdale Mall	Cedar Rapids, IA	Summer 1979	58.12%
Sunnyvale Town Center*	Sunnyvale, CA	Fall 1979	50 %
Villa Westwood**	West Los Angeles, CA	Fall 1979	70 %
Clackamas Town Center	Portland, OR	Fall 1980	50 %
The Fashion Show	Las Vegas, NV	Fall 1980	25 %
Ogden City Mall*	Ogden, UT	Fall 1980	75 %
The Plaza Pasadena*	Pasadena, CA	Fall 1980	72.64%
Santa Monica Place*	Santa Monica, CA	Fall 1980	20 %
Santa Rosa Mall*	Santa Rosa, CA	Spring 1981	75 %
Mall of Memphis	Memphis, TN	Spring 1981	50 %

[14]

*Redevelopment project
**Specialty shopping center.

Item 5. LEGAL PROCEEDINGS

The Company and its joint ventures are parties to lawsuits which challenge the propriety of zoning permitting the development and construction of shopping centers or which seek to prevent construction of shopping centers on the grounds that such construction would violate certain zoning or environment-related regulations. These actions affect The Plaza Pasadena and Marin Mall, which are in the construction and development stages and scheduled to open in 1980 and 1982, respectively. At February 28, 1979, the Company's investment, and commitments to invest, in such projects aggregated approximately $6,511,000. See "Commercial Property Development—Regional Shopping Centers—Development Stage Projects" in Item 1—Business.

Previously described litigation affecting Santa Rosa Mall has been resolved in favor of the Company. Litigation affecting Clackamas Town Center has been concluded and, in connection therewith, the Company paid a cash settlement of $500,000.

In addition to the foregoing, the Company is a defendant in a number of lawsuits arising in the ordinary course of business.

Management believes that the above-mentioned lawsuits will not have a material adverse effect upon the Company's operations.

Appendix X(1)

The Sherman Act, 15 U.S.C. 1 et seq., and more particularly Sections 1 and 2:

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every

person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed gulity of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Appendix X(2)

The Clayton Act, 15 U.S.C. 12 et seq., and more particularly 15 U.S.C. Section 26:

§ 26. *Injunctive relief for private parties; exception*

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Appendix X(3)

Administrative Procedure Act, 5 U.S.C. 551 et seq. and 5 U.S.C. 701, et seq., and more particularly Section 702:

§ 702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 706. *Scope of review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

....

(C) in excess of statutory jurisdiction, authority, or imitations, or short of statutory right;

(D) without observance of procedure required by law;

Appendix X(4)

The National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq., and more particularly 15 U.S.C. 1460(c)(4):

(c) "Urban renewal project" or "project" may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with such urban renewal plan. Such undertakings and activities may include—

...

(4) disposition of any property acquired in the urban renewal area (including sale, leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan or as provided in section 1457 of this title;

Appendix Y

URBAN RENEWAL HANDBOOK
7214.1 REV
LAND MARKETING AND REDEVELOPMENT

Chapter 1

CHAPTER 1. INTRODUCTION

1. SCOPE. This issuance establishes policies and requirements applicable to the marketing, disposition and redevelopment of real property under all urban renewal projects and Neighborhood Development Programs, receiving HUD financial assistance under Title I of the Housing Act of 1949, as amended.
2. PURPOSE. This issuance has been prepared to (a) simplify, clarify, and improve the organization of existing policies and requirements, (b) place greater reliance on each Agency to manage its own day-to-day operations by minimizing the need for the Agency to obtain advance HUD concurrence in routine actions, and (c) orient HUD monitoring and evaluation activities toward actual Agency progress in achieving performance goals.
3. OBJECTIVES. Realization of the redevelopment contemplated by the Urban Renewal Plan is a principal objective of the urban renewal process. In seeking this objective, the Agency shall:
   a. Schedule and coordinate land marketing activities with land acquisition, relocation, demolition and the installation of site improvements, so that the disposition of land can be consummated and redevelopment can get underway as soon as the land is physically ready for development.
   b. Publicize the availability of sites, affording potential redevelopers the opportunity to make their interest known.

c. Conduct the disposal of project land in a fair and equitable manner that is open to public scrutiny.

d. Adopt effective methods to prevent redevolpers from speculating in project land.

4. DEFINITIONS. For the purposes of this issuance, the following terms have the following meanings:

a. *Agency*—This term means the particular agency to which HUD financial assistance is made available for a specific urban renewal project or Neighborhood Development Program. It is synonomous with term Local Public Agency (LPA) as used elsewhere in the Urban Renewal Handbook and Neighborhood Development Program Handbook.

b. *Fair Reuse Value*—This term means the fair market value of the property for its highest and best uses permitted under the Urban Renewal Plan. [1]

c. *Disposal for Public Use*—This term means a disposal to the Federal government, a State, a local government, any political subdivision thereof, any of their agencies or instrumentalities, or retention by the Agency.

d. *Disposal for Nonprofit Institutional Use*—This term means a disposal to a nonprofit scientific, educational, public health, public welfare, charitable, hospital or other eleemosynary institution, which will operate the redevelopment for a nonprofit institutional use, e.g., a hospital, church, library, school, or playground. Acquisition of land by a nonprofit institution for investment or resale is not considered a nonprofit institutional use. The nonprofit institution must be exempt from Federal taxation under the Internal Revenue Code.

e. *Critical Parcel*—This term means a parcel which must be redeveloped for a specified reuse in order to successfully accomplish the objectives of, and complete, the project.

5. MANDATORY REQUIREMENTS. Except where specifically designated as optional or advisory, or prohibited by State law, the policies and requirements of this issuance, 7214.1 REV, are mandatory. As used herein, the terms "may" and "should" denote optional and advisory provisions.

6. BUDGET DEFICIENCIES. HUD assumes no obligation to pay any share of a budget deficiency resulting when (a) the total cost of real estate services and related disposition expenses exceed the amount set forth in the approved project budget for such purposes, or (b) total land disposal proceeds are less than the estimated proceeds set forth in the approved budget. For specific details with respect to budget revisions, the Agency should refer to applicable program regulations or contact HUD.

7.-9. RESERVED. [2]

CHAPTER 2. REAL ESTATE SERVICES

10. ECONOMIC AND MARKEKT ANALYSIS STUDY (EMAS). An EMAS is required during the initial NDP action year except when all land is intended for institutional or public uses, or when HUD determines that the data and information at hand are clearly sufficient in amount, timeliness, validity, and detail as to make additional study for the proposed private development unnecessary. An EMAS shall be undertaken whenever doubt exists as to the absorption and the redevelopment potential of the land over a reasonable period of time. When marketability problems are fore-

seeable, land acquisition should be postponed until the EMAS results are known and evaluated. The EMAS shall be updated and revised as necessary. Detailed guidelines for preparing an EMAS are contained in Appendix 1.

11. LAND USE AND MARKETABILITY STUDY (LUMS). A Land Use and Marketability Study is similar to an EMAS. However, it is normally associated with the older conventional urban renewal projects, while the EMAS is associated with NDP's. For general details as to the scope of services and related procedural information for a LUMS, see Paragraph 10 above and Appendix 1.
12. TRANSIENT HOUSING STUDY. As required by Section 106(g) of the Housing Act of 1949, as amended, the Urban Renewal Plan for a conventional urban renewal project shall not permit the new construction of a hotel or other transient housing on project land, unless the need for such housing has earlier been established on the basis of an appraisal or market study, providing a competent independent analysis of the local supply of such housing. For disposals under the Neighborhood Development Program, such analysis and determinations as to the need for transient housing shall be made prior to the disposal.
13. PLATS AND LEGAL DESCRIPTIONS. If practicable, required land surveys or plats and legal descriptions should be prepared prior to obtaining the reuse appraisals. They should reflect the bearings and dimensions of each disposal parcel and each area subject to different land use controls or redevelopment requirements under the Urban Renewal Plan, be certified in accordance with local legal requirements, and be

suitable for filing in the land records of the locality. The plat should indicate existing and proposed easements and the outline and location of any structures. A certified tabulation, showing the area of each parcel in square feet, should be placed on the plat or attached to it. [3]

14. REDEVELOPMENT CONSULTANT. The scope of services and frequency of consultation to be provided by a redevelopment consultant will depend upon the nature of the disposal problems and may cover the following kinds of activities:
    a. Recommending specific land uses, controls and restrictions; correlating land uses with EMAS; analyzing impediments to land disposal in the Urban Renewal Plan and proposing appropriate solutions.
    b. Preparing and implementing a sales program, including sales brochures, direct mail solicitation, other forms of advertising and other methods of stimulating redeveloper interest; guiding the Agency in the use of real estate brokers, including basis for their participation and compensation; recommending administrative staff organization of Agency for carrying out its land disposal effort; and advising Agency as to the means for making the land attractive for sale.
    c. Interpreting and evaluating the EMAS, appraisals, market analyses, and other studies; preparing special studies; and recommending as to the need for additional studies or appraisals.
    d. Scheduling and coordinating land acquisition, relocation, demolition, installation of project improvements and supporting facilities, and other actions, in order to develop and maintain a market

and provide for orderly and expeditious disposition within the capacity of the market to absorb the land and the new facilities to be provided.

e. Advising on the choice of disposal methods; evaluating bidding documents and proposed forms of disposal agreements from the viewpoint of their effect upon the marketability of the land and the availability to developers of adequate mortgage financing.

15. USE OF REAL ESTATE BROKERS. If the Agency utilizes private real estate brokers to sell project land by means of open non-exclusive sales listings, it should widely publicize the availability of such listings. All brokers indicating an interest should be advised promptly and simultaneously as to new listings. If the Agency believes that the granting of an exclusive sales listing would measurably improve its disposition program, it may do so, if permitted by State and local law. The justification for the Agency's determination to grant an exclusive sales listing shall be fully documented in its files. **[4]**

a. *Eligibility of Broker for Commission.* To be eligible for a sales commission the broker must be employed by and represent the Agency through a clearly established arrangement, whether by written contract or other method deemed acceptable under the circumstances applicable to the specific sale and comply with the requirements of subparagraph b below. The Agency shall not pay a sales commission if any of the following circumstances applies:

(1) The sale property is for public or public housing reuse, or is sold to a public body.

(2) The broker or his agents or employees has an interest in the purchaser or is employed by the purchaser, whether by contract, salary, or other means.

(3) The Agency has employed the broker, or his employer or employee, to appraise the property for disposition purposes or provide consultant services involving the disposal of the property.

b. *Equal Opportunity Requirements.* The contract with the broker shall contain (or the broker shall certify to) the following requirements:

(1) *Equal Employment Opportunity* requirements contained in paragraph 8 of Form HUD-621B, Contract for Professional or Technical Services.

(2) *Equal Housing Opportunity* requirements as follows: "The Broker agrees that neither he nor any of his sales or rental personnel, employees, or others authorized to act for him will, in violation of Title VIII of the Civil Rights Act of 1968 (The "Fair Housing" Title of Public Law 90-284) or Executive Order 11063, decline to show or will discriminate in the sale or rental of any property now or hereafter listed with him.

"It is further agreed that the Broker will: (1) instruct his staff in the policies of nondiscrimination and applicable laws; (2) prominently display the Fair Housing Poster in all offices in which sale or rental activity takes place; (3) use the approved Equal Housing Opportunity logo, slogan, or statement in all

advertising in conformance with the Advertising Guidelines for Fair Housing. [5]

"The Broker agrees that noncompliance by him or any employee of his organization with the laws, executive orders, or regulations against discrimination in the sale or rental of any property or with the provisions of this paragraph (or certification) will be proper basis for barring the Broker from participation in the selling, renting or managing of properties in HUD-assisted urban renewal areas."

c. *Commission Rates.* Real estate commissions shall not exceed payments prevailing in the locality for equivalent services, except that in difficult marketing situations, HUD may, on a case-by-case basis, approve a fully justified request for higher rates. To be eligible as a project cost, such higher rates must be approved by HUD in writing in advance of payment. Commissions shall only be paid after the conveyance and shall be based on services actually rendered.

d. *Evaluation of Offers on Net or Gross Price Basis.* The Agency shall dispose of project land in a manner expected to produce the highest return to the project consistent with the requirements of the Urban Renewal Plan. Usually this means the evaluation of bids on the basis of net disposal proceeds (gross price less sales commission). However, when the Agency determines that the overall highest net return to the project is most likely to be obtained through the use of brokers who will

not participate adequately except on a gross bid award basis, the Agency may utilize this method if permissable under State law. In either event, for project budget purposes, sales commissions shall be treated as a disposition expense rather than a reduction in disposal proceeds.

16. SELECTION OF APPRAISERS AND CONSULTANTS.

a. *General.* Appraisers and consultants shall be selected on the basis of their qualifications to perform the particular services to be required. If the reuse appraisals involve difficult problems of marketability, the reuse appraiser should be qualified to provide the required market analysis as well as the appraisal. Economic and marketing consultants shall be throughly experienced in all phases of the redevelopment process, including real estate sales, financing, brokerage, construction, packaging, appraising, leasing, and sales promotion relating to the types of private reuses proposed in the Urban Renewal Plan. Selection need not be by competitive bidding unless required by State or local law. The Agency shall select its appraisers and consultants without regard to race, color, religion, sex or national origin. [6]

b. *HUD Selection Role.* If requested, HUD will assist the Agency in selecting appraisers and consultants and in preparing the scope of services to be provided under the contract. Advance HUD approval is required for appraisers of the reuse value of residential land to be developed under HUD housing programs.

c. *Consultant Employed with Other Public Agency.* Arrangements for paid consultation or other

assistance from a member of another public agency shall be made in accordance with Chapter 2 HUD Handbook 7217.1, LPA Administration, between the two agencies involved rather than directly with the public employee.

d. *Evidence Supporting Contracts.* Along with a copy of the contract itself, the Agency's files shall contain a full record of all actions with respect to its selection of an appraiser or consultant and its award of the contract, including:

(1) Resolution, motion, or similar action of the governing body of the Agency authorizing the contract.

(2) If more than one appraiser or consultant was considered, identification of all who were considered, summary of the bids or proposals received, and, if the low bid was not accepted the considerations which governed the selection of the contractor. If only one appraiser or consultant was considered, explanation of the basis for the selection.

(3) Statement of the actions taken to ascertain the prevailing rates in the locality for equivalent services, and the basis for the Agency's determination of the compensation provided in the contract.

(4) Signed statement by the contractor setting forth his technical qualifications and general experience for performing the services, specific experience in appraising properties of the type involved, his registration or license number if required by State or local law, and other information pertinent to establishing his professional qualifications.

e. *Clearance of Contractor.* The Agency shall not enter into any contract with an individual or firm whose name appears on the HUD-maintained list of debarred, suspended and ineligible bidders. When requesting clearance, the Agency shall furnish HUD the name and address of the proposed contractor, including that of any officer, partner, director, trustee, member of governing body, participant in a joint venture or other person holding an interest of more than 10 percent in the contractor. [7]

17. GUIDEFORM AGREEMENT FOR REUSE APPRAISAL SERVICES. Reuse appraisal contracts shall be prepared in accordance with Form HUD-324, Form of Contract for Reuse Appraisal of Redevelopment Sites. Prior HUD concurrence is required for any substantive changes in the provisions of this form. (If the Agency has any doubt as to whether HUD concurrence is required, it shall consult with the HUD Area Office.) If the Agency obtains any special market analyses or engineering reports on project land, they shall be made available to the reuse appraiser.

18. USE OF REUSE APPRAISER FOR OTHER REAL ESTATE SERVICES. The Agency shall ensure that its reuse appraiser is not permitted to act as a broker or redeveloper for land which he has appraised for disposition purposes for the Agency.

19. COMPENSATION. The fee for appraisal or other real estate services shall be in a lump-sum amount or separate lump-sum amounts for specified services, based upon the prevailing rates in the community for equivalent services. The fee shall cover all services, supplies, and expenses of the contractor. Compensation shall not be based upon the amount of valuation or

other findings of the contractor. Per diem compensation is permitted only for consulting or advisory services on an intermittent or temporary basis or for court testimony.

20.-21. RESERVED [8]

CHAPTER 3. DETERMINATION OF DISPOSAL PRICE

22. MINIMUM DISPOSAL PRICE. Unless sold for low- or moderate-income housing at the Section 107 valuation, or dedicated, as authorized for certain public purposes, urban renewal land shall be disposed of at a price not less than its fair reuse value. The fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land uses to be imposed on the redeveloper by the Urban Renewal Plan.

23. NUMBER OF APPRAISALS. Except as described in subparagraphs a, b, c, and d below, each disposal parcel must be appraised independently by at least one competent professional appraiser in private practice. If the fair reuse value of a parcel exceeds $25,000, at least two appraisals shall be obtained. If two or more appraisals are obtained, one may be performed by a competent Agency staff appraiser. These requirements assume that all such appraisals will be reviewed by a fully qualified real property appraiser as provided in paragraph 32.

a. If the parcel to be appraised is a fragment of vacant land not separately buildable in accordance with the urban renewal plan, one appraisal by a qualified appraiser in private practice or on the staff of the Agency is sufficient.

b. HUD shall, upon request from the Agency, determine the fair reuse value of property to be sold for low-or moderate-income housing under the Section 107 valuation. (See paragraph 24 below.) There will be no fee charged to the urban renewal project for such HUD appraisal.

c. If the parcel is fully (100%) eligible as a project improvement and dedicated in accordance with paragraph 29 below, it need not be appraised.

d. If the parcel is designated for single family residential reuse, its fair reuse value may be determined by HUD appraisal. When this method is utilized, the urban renewal project shall be charged the standard HUD-FHA appraisal fee.

24. SECTION 107 APPRAISAL OF SITES FOR LOW OR MODERATE-INCOME HOUSING. As described in paragraph 23b above, HUD will determine the value of property to be sold for low-or moderate-income housing under the provisions of Section 107 of the Housing Act of 1949, as amended.

a. *Definition of Section 107 Valuation.* The Section 107 valuation is the maximum price that would be paid for the property by a well-informed, prudently acting buyer, who is motivated solely by the objective of meeting the housing needs of low-or moderate-income families or individuals, rather than by profit or gain, [9] and who is not controlled or directed or influenced in his decisions, by persons or firms seeking to derive profit or gain from the undertaking.

b. *Objective.* The objective of the valuation analysis is to estimate the price for the project property that would be equally as attractive to the assumed

kind of buyer as the most attractive available purchase of a substitute or alternative property, suitable for the same purpose.

c. *Location of Alternative Sites.* Each alternative property to be considered must be in a location which is suitable for serving the low-or moderate-income families or individuals of the community. Where the jurisdiction in which the buyer may purchase a site is limited, the location of the comparison sites shall be similarly limited.

d. *Recent Sales and Current Offerings.* The appraiser shall consider recent sales and asking prices, and the estimated current available market prices based on such data, for suitable alternative properties.

e. *Other Factors to be Considered.* In comparing the project site with suitable alternative properties, the appraiser shall consider, and make appropriate allowances for, among other things:

(1) Differences in the prices of the alternative properties.

(2) Differences in the cost of developing or rehabilitating the properties, whether the difference is attributable to location, topography, bearing quality of the soil, or other consideration (allowing appropriate adjustments for the impact of income taxes on development costs versus land payments).

(3) Differences in the costs of operating and maintaining the properties, after development.

(4) Appropriate differences in the degree to which the properties would serve the needs and desires of the prospective low-or moderate-income occupants or affect their other living

costs, such as transportation to place of employment. Such adjustments also must be justifiable in terms of the differences in rental payments and occupancy charges that would result.

f. *Factors Not to be Considered.* In comparing properties, the appraiser shall not consider:

(1) The availability of special financing, tax abatement, or other public subsidies for low-or moderate-income housing. [10]

(2) Any limits established for the maximum income of families or individuals eligible to occupy low or moderate income housing.

g. *Documentation in Appraisal Report.* The appraisal report shall contain the data, analyses and reasoning by which the appraiser reached his opinion of the Section 107 valuation of the project property. All assumptions of the appraiser with respect to changes to be made in the condition of the project property and with regard to project improvements and public facilities to be installed shall be stated in the appraisal report.

25. SALES SUBJECT TO REHABILITATION. The minimum disposal price for property to be disposed of subject to rehabilitation by the purchaser is the greater of (a) its fair reuse value or (b) 120 percent of the estimated fair reuse value of the land, if cleared. If the 120 percent test price is not obtainable, it is to be assumed that rehabilitation is not feasible. If the Agency believes there are special circumstances which warrant a waiver of this requirement, it shall submit its request, with justification, to HUD. Waivers will only be granted on a case-by-case basis. (The 120 per-

cent rule does not apply to properties sold for low and moderate income housing in accordance with the provisions of Section 107, or to properties sold for restoration and maintenance by the purchaser for historic or architectural purposes.)

26. DISPOSAL PRICE FOR HISTORIC OR ARCHITECTURAL PURPOSES. The minimum disposal price for property to be disposed of for restoration and maintenance by the purchaser for historic or architectural purposes is its fair reuse value. The fair reuse value shall, of course, reflect both the advantages created by the project and the conditions and restrictions to be imposed upon the development and use of the property in accordance with the Urban Renewal Plan.
27. FAIR REUSE VALUE FOR PUBLIC OR NONPROFIT INSTITUTIONAL USE. The fair value of land to be devoted to a public or nonprofit institutional use shall be based on its value for the most suitable alternative private use or uses which are compatible with the land uses permitted by the Urban Renewal Plan for the remainder of the urban renewal area. If the characteristics of the parcel would make it undesirable for private development (e.g., highway right-of-way), the value shall be consistent with the private-use value of adjacent land having characteristics appropriate for private redevelopment.
28. DISPOSAL PRICE OF EASEMENTS FOR PUBLIC UTILITIES. An Agency may grant or reserve, without charge, easements in project land for public utility service lines required to serve project land. These [11] easements may be provided regardless of the eligibility of the service lines as a project improvement. However, any portion of a right-of-way for an easement in excess

of the requirements for the project (and any easement that does not serve the project) shall be sold at not less than its fair reuse value.

29. DISPOSAL PRICE OF LAND FOR PROJECT IMPROVEMENTS. The Agency may dedicate, without charge, the land or interest in land that is fully (100%) eligible as a project improvement, as determined in accordance with the provisions of RHA 7209.1, Site Preparation and Project Improvements. Land in excess of the amount eligible for project improvement purposes must be sold at not less than its fair reuse value. In addition, in the case of a project improvement park (or certain other project improvements), if the improvement is only partially eligible (a range of 10% to 80% based on relative benefit as determined in accordance with RHA 7209.1), the dedication benefits applied to the required land shall reflect the same ratio. For example, if the project improvement park is determined to be 40% eligible, the land for such park shall be sold at not less than 60% of its fair reuse value.
30. DISPOSAL PRICE FOR FEDERAL-AID HIGHWAY USE. As soon as the Agency learns that project land is to be included in the tentative right-of-way of a proposed Federal-aid highway project, it shall discontinue further site clearance work on such land until the State Highway Department (SHD) enters an agreement (see paragraph 45c) to reimburse the Agency for the cost of acquisition, as determined in accordance with subparagraph a below, for all project land which it subsequently acquires from the Agency as part of the right-of-way.
    a. *Land Not Cleared Prior to Highway Notice.* Except as provided in subparagraph b below all proj-

ect land required for a highway project receiving Federal financial assistance shall be sold to the SHD at its cost of acquisition to the Agency, including applicable settlement and clearance costs and relocation expenses as determined in accordance with the HUD Relocation Handbook, 1371.1 (REV). Costs attributable to parcels lying partly within the right-of-way shall be prorated on the basis of the ratio of land area in the right-of-way portion of the parcel to the total land area of the parcel, regardless of the location of improvements. (As an alternative to this parcel by parcel determination, the total cost of acquisition of the right-of-way may be determined by prorating acquisition costs on the basis of the ratio of land area in the right-of-way to the total land area of the project, or appropriate segment thereof, regardless of the location of improvements.) [12]

b. *Land Acquired and Cleared Prior to Highway Notice.* Project land which is acquired and cleared (or under contract for clearance) before the Agency receives notice of a Federal-aid highway project (either written documentation of its approximate location or a request for conveyance of the right-of-way) may be sold at its fair reuse value as approved mutually by the Agency and the SHD.

31. VALUE OF RIGHT TO REMOVE IMPROVEMENTS. If an existing building or other improvement is to be sold for removal to a site already owned by the purchaser, it shall be sold at its "value for removal at a purchaser's expense." A minimum of one appraisal or engineer's estimate by a professional in

private practice or qualified individual on the staff of the Agency or other public body shall be obtained. However, for a package disposal consisting of both a site in the project area and a structure for removal to such site, the provisions of paragraph 23 apply to the entire package.

32. REVIEW OF APPRAISALS.

a. *Evaluation by Reviewer.* The appraisals and related market analyses shall be reviewed by a competent staff appraiser or private professional appraiser under contract to the Agency. The review appraiser shall require the appraisers to make all necessary corrections in their reports, particularly those needed to ensure substantial consistency in factual data therein. The reviewer shall determine the acceptability and adequacy of the appraisal reports, including the data and analyses furnished by the appraisers to support their opinions of value and the correctness of their estimates. The review shall include an on-site inspection of the property and of comparable properties considered by the appraisers in deriving their valuations.

b. *Report of Reviewer.* If the reviewer finds the appraisal reports acceptable and properly documented, he shall determine for each parcel his opinion of its fair reuse value. Such value shall not be less than the lowest acceptable appraisal amount. The reviewer's findings shall be set forth in a written report which shall identify the appraisal reports reviewed and explain the basis for his conclusion as to the fair reuse value of each parcel.

33. CERTIFICATION OF FAIR REUSE VALUE.

a. *Acceptance of Review Appraiser's Determination.* The Agency shall study the review appraiser's fair reuse value determination and his report thereon. With respect to properties [13] for which the Agency accepts the reviewer's report and valuations, the governing body of the Agency shall adopt a resolution or motion, or an authorized official acting under a general resolution shall make a certification, which:

(1) Identifies each property by parcel number, square footage and proposed reuses.

(2) Specifies the amount established as the fair reuse value for each property.

(3) Certifies that the work of the appraisers and the review appraiser has been performed in a competent manner in accordance with State law and HUD policies and requirements.

b. *Disagreement with Review Appraiser's Determination.* If the Agency disagrees with the review appraiser's determination of the fair reuse value of a property, it shall submit to HUD all appraisal reports and related market analyses on the property, the report of the review appraiser, and a statement of the determination of fair reuse value proposed by the Agency and its justification therefor. HUD will then determine the fair reuse value of the property.

c. *Submission Requirements.* Promptly after the Agency establishes the fair reuse value of a parcel, it shall submit to HUD on a confidential basis, (1) a certified copy of the resolution, motion, or certification establishing fair reuse value, and (2) a list of all appraisal report valuations, applicable dates therefor, and names of the appraisers. If a certification by an authorized official is used, a copy of the general resolution authorizing such use, shall be filed with HUD.

34. UPDATING DETERMINATION OF FAIR REUSE VALUE.

a. *Current Appraisal Evidence.* The Agency's appraisal evidence shall be current at the time of the disposal. New appraisal evidence is required if any of the appraisals, upon which the determination of the fair reuse value has been based, would be more than 18 months old at the time of execution of the disposal agreement. New appraisal evidence is also required if there has been any significant change in the market, condition or proposed reuse of the property, or the Urban Renewal Plan. [14]

b. *Procedure for Updating Fair Reuse Value.* When appropriate, the Agency shall have its appraisals brought up to date or supplemented or it shall obtain new appraisals. New appraisal evidence shall be reviewed in accordance with paragraph 32 above, and the updated fair reuse value shall be established in accordance with paragraph 33.

35.-36. RESERVED. [15]

Appendix Z(1)

Z(1)

2. The dispersion of core functions will create a large economic loss in property values throughout the core and in tax revenues over many years to come. Many of the activities now centrally located will move out of the jurisdiction of the City. This dispersion will lead to losses in downtown business volume and local businesses will suffer.

3. A new downtown regional shopping center will offer a unique attraction not only to residents of Santa Rosa and its environs but throughout the entire regional trade area. It will insure that Santa Rosa remains as the focal point; the existence of two large shopping centers (including Coddingtown), complementing each other, will strengthen its attraction to shoppers from the hinterland and will be another advantage to be considered by all manner of visitors, by prospective in-migrants and by those who are seeking a new location for a plant or business. The creating of a downtown regional shopping center in Santa Rosa will deter plans for any other competing new center in the trading area for some years to come.

There seems to be little doubt but that a community cost-benefit analysis would reveal benefits so substantial and enduring as to not only off-set the possibility of a small difference in disposition proceeds which might accrue under another type of commercial use than a shopping center, but also justify a substantial public investment at this time to the extent necessary [7]

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Z(1)

One more question with respect to the regional shopping center use of the subject property should be answered and clarified. If the regional center is an over-improvement of

the site involving substantial extra costs, could not the objectives be accomplished and the extra costs avoided through a less intensive development? A smaller center with perhaps two department stores and a smaller GLA might avoid the necessity for levating the structure and providing a parking structure on site. It is a clear answer that if the center were small enough, the extra costs could indeed be avoided. However, any development short of a regional center will fail in the accomplishment of the primary objective—the revival of the central core of Santa Rosa and the preservation of its now threatened role of the central place and focal point for the entire region. A smaller community center is unlikely to attract much attention outside of the city itself and will be ineffective in warding off the construction of one or more regional centers in other parts of the trading area. It is clear that now is the critical point in time for the creation of the proposed dramatic and highly functional regional center on the subject site. [9]

* * * * * * *

Z(1)

The prompt development of the Santa Rosa center will be a strong inhibitor of the development of any new center in the region. While the proposed Rohnert Park center is premature and not a serious possibility at this time, the actuality of the subject center would kill off any possibility of a major development in Rohnert Park for a long time to come.

Market Price Behavior

Introduction

Because the best evidence of market value is the record of prices which have been secured in the market for prop-

erties similar to the subject property, appraisers usually place major reliance upon "comparables", i.e., the record of recent sales of similar properties under similar market conditions. In the present case, it is literally true that no comparables can possibly be found; there are no centrally located tracts of 30 acres which have recently been sold in Santa Rosa. In fact, throughout the whole State, there is no record of a recent sale in a community comparable to Santa Rosa involving a similar tract for which the most probable and most productive use is a regional shopping center. But this fact does not mean that market price behavior is to be ignored nor that it is irrelevant as useful evidence. This appraisel presents evidence on land sales which fall into four categories. This evidence will now be summarized and presented with analysis and comments on its [24]

* * * * * * *

Appendix Z(2)

Z(2)

FINAL ENVIRONMENTAL IMPACT STATEMENT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JULY, 1975.

G. ECONOMIC

Impact of project on Environment

The project will provide downtown Santa Rosa with 700,000 square feet of modern commercial space and adequate parking facilities. This, when combined with existing commercial areas, will reestablish downtown Santa Rosa as the principal retail center for Sonoma County.

The regional shopping center will attract many more shoppers into the downtown area, thus providing new customers for existing downtown merchants and providing them with an opportunity for economic expansion. Owners of older retail buildings will have an incentive to upgrade and remodel their existing facilities in order to compete with the new center and capture a share of the new customers. The new pool of customers in turn will provide the additional economic return that will make such rehabilitation a profitable investment.

The center will also strengthen the economic viability and promote expansion of firms which provide services to the retail stores existing in downtown Santa Rosa.

With upgraded stores and expanded supporting services some new retail uses can be expected to be attracted to the areas of downtown Santa Rosa outside the renewal project, providing further economic growth for the city.

The new shopping area will make downtown Santa Rosa a more attractive place to locate new offices because of the proximity of government and retail services in the renewal

project areas. Thus the project will tend to give downtown Santa Rosa a better balanced economic base.

Z(2)

The fully occupied shopping center should be able to absorb most of the needed growth of commercial space in Santa Rosa until about 1990. This will prevent overly intensive development of rural areas because of low land prices before there is the population in the adjacent area to support such development. This relates to the comments on prevention of urban sprawl more fully outlined in the Land Use Section.

While the structure is being built it will provide construction jobs over a period of 2 years, thus providing needed help for the construction industry in Sonoma County. The center will also create 1,000 permanent jobs in the retail sales field, and will also have some multiplier effect on the rest of the County's employment which cannot be precisely measured. [114]

Revenues from the shopping center will be used to provide free parking throughout downtown Santa Rosa thus allowing office and government as well as retail uses in the city to compete more effectively with rural and suburban centers that provide free parking by using cheap, previously undeveloped land.

The project, by reclaiming land previously in commercial uses, will bring the land in the area up to its highest economic use, as opposed to its previous underutilized state. And after the tax increments have been used to pay off project expenses, the City will gain a substantial benefit in increased property tax revenues.

The additional increase in sales and income tax revenues and personal income of Sonoma County residents further warrant the expenditure of public funds for redevelopment

of downtown Santa Rosa. Also, the secondary growth and improvements stimulated by the center will increase tax revenues from the downtown area.

Z(2)

Thus the regional shopping center will result in an economically strong central Santa Rosa that can effectively compete with outlying areas. [115]

Appendix Z(3)

Z(3)

TEACHERS INSURANCE AND ANNUITY
ASSOCIATION OF AMERICA

730 THIRD AVENUE, NEW YORK, N. Y. 10017
(212) 490-9000

March 18, 1976

Santa Rosa Associates,
a Limited Partnership
c/o Robert Campbell Company
10889 Wilshire Blvd.
Los Angeles, California

Gentlemen:

Your offer to sell and simultaneously leaseback, as well as your application for a leasehold loan, has been accepted and approved, and we agree with you as follows:

Purchase Provisions

1. Subject to the terms and conditions herein, and for the purchase price indicated, we agree to purchase and you agree to sell and convey to us or to our nominee, the land hereinafter described:

Property:

Location	N/E/C	U.S. 101 and 1st Street Santa Rosa, California
Plot Size	6.33 acres	

Purchase Price:

$3,000,000 or the value established in the appraisal required under this agreement, whichever is the lesser amount, absolutely net to us and payable upon delivery of the deed.

Z(3)

2. The delivery of deed is to take place on a date to be agreed upon but with not less than 5 days notice to us and on or before the expiration date hereof in our office or in escrow with the title insurance company issuing the

* * * * * * *

Interest Rate: 9¼% *Term:* 35 years

Repayment:

At a constant rate of 9.64% per annum, payable monthly, to be applied first to interest and the balance to principal.

Prepayment Privilege:

None during the first seventeen years following the commencement of amortization and then, in full, on any installment payment date thereafter, upon 30 days' prior written notice, with a premium of 5% on the amount so prepaid during the eighteenth year following commencement of amortization, declining ½ of 1% per annum thereafter to a minimum premium of 1%, which minimum premium shall continue thereafter to maturity.

Accumulations:

Deposit monthly, and without interest thereon, of prorata ground rent, taxes, assessments, and insurance premiums next due, all as estimated by us.

Exculpatory:

That in the event of default in the loan terms, the mortgage shall be foreclosed first and thereafter no claim, suit or action shall be filed on account of any deficiency under the Note.

Z(3)

Improvements:

The developer's portion of a two-level, enclosed mall regional shopping center containing 322,000 square feet of mall stores, 20,865 square feet of free standing buildings, a 91,788 square foot enclosed mall and 28,000 square feet of service corridors and management offices. The mall will connect with a 161,342 square foot Sears, Roebuck & Company department store and TBA, a 135,530 square foot R. H. Macy department store and a 75,600 square foot Mervyn's department store. The first two department stores will covenant to operate under their respective names for 15 years and an additional 5 as department stores. Mervyn's will sign a 30-year lease and will covenant to operate under its own name for 15 years and an additional 5 as a department store.

Paved Parking

Sufficient space for 3,675 cars including deck and surface parking and reciprocal rights over the entire center all in accordance with a Parking Agreement required herein, and, the rights,

* * * * * * *

Supreme Court, U.S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1051

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF ROHNERT PARK, PETITIONER

v.

MOON LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	9
Conclusion	18

CITATIONS

Cases:

Bates v. *State Bar of Arizona*, 433 U.S. 350	15
Buckley Towers Condominium, Inc. v. *Buchwald*, 533 F.2d 934, cert. denied, 429 U.S. 1121	11
California Bankers Ass'n v. *Shultz*, 416 U.S. 21	17
California Diversified Promotions, Inc. v. *Musick*, 505 F.2d 278	16
Cort v. *Ash*, 422 U.S. 66	8
Data Processing Service v. *Camp*, 397 U.S. 150	10
Davis v. *Passman*, 442 U.S. 228	10
Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59	14
Gibson & Perin Co. v. *City of Cincinnati*, 480 F.2d 936, cert. denied, 414 U.S. 1068	14
Hanson v. *Shell Oil Co.*, 541 F.2d 1352, cert. denied, 429 U.S. 1074	15
Metcalf v. *National Petroleum Council*, 553 F.2d 176	12

Cases—continued:

	Page
Mid-West Paper Products Co. v. *Continental Group, Inc.*, 596 F.2d 573	13
Montana v. *United States*, 440 U.S. 147	16
Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, cert. denied, 414 U.S. 1045	7
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453	10
Parker v. *Brown*, 317 U.S. 341	15
Public Citizen v. *Lockheed Aircraft Corp.*, 565 F.2d 708	12
Santos v. *District Council of New York City, etc.*, 547 F.2d 197	12
Schwartz v. *General Electric Co.*, 107 F. Supp. 58	11
Sierra Club v. *Morton*, 405 U.S. 727	10
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26	11, 12-13
Tugboat, Inc. v. *Mobile Towing Co.*, 534 F.2d 1172	11
United States v. *Aluminum Co. of America*, 148 F.2d 416	6, 15
United States v. *Grinnell Corp.*, 384 U.S. 563	15
United States v. *SCRAP*, 412 U.S. 669	10, 12
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252	13, 16
Warth v. *Seldin*, 422 U.S. 490	12, 13, 14
Wisniewski v. *United States*, 353 U.S. 901	17

Constitution, statutes and rules:

	Page
United States Constitution, Article III	11
Administrative Procedure Act, 5 U.S.C. 702	10
Clayton Act, Section 16, 15 U.S.C. 26	11, 12
Housing Act of 1949, 42 U.S.C. 1441 *et. seq.*	2
42 U.S.C. 1452	3
42 U.S.C. 1455	3
42 U.S.C. 1455(b)	3
42 U.S.C. 1460(c)(4)	2, 3, 6, 9
Sherman Act, Sections 1 and 2, 15 U.S.C. 1, 2	2, 5
Fed. R. Civ. P. 56(c)	17
Fed. R. Civ. P. 56(d)	17

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 220-240) is reported at 601 F.2d 1040. The order of the district court (Pet. App. 183-188) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1979. A petition for rehearing was denied

on October 26, 1979 (Pet. App. 254). The petition for a writ of certiorari was filed on January 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a municipal corporation, has standing to complain of alleged violations of federal antitrust laws by a neighboring town.

2. Whether petitioner has standing to complain that respondent Secretary of Housing and Urban Development violated the Housing Act of 1949, 42 U.S.C. 1441 *et seq.*

STATEMENT

Petitioner, the City of Rohnert Park, is located seven miles north of respondent City of Santa Rosa in Sonoma County, California. This case is a continuation of the dispute between the two cities over their respective plans to build new regional shopping centers. Petitioner seeks to prevent Santa Rosa from selling urban renewal land to respondent Ernest W. Hahn, Inc., a developer, for use as a shopping center. Petitioner alleges that Hahn is obtaining the urban renewal land at less than its fair reuse value in violation of the Housing Act of 1949, 42 U.S.C. 1460(c)(4). Petitioner also asserts that this transaction violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

1. Under the Housing Act of 1949, 42 U.S.C. 1441 *et seq.*, a locality such as Santa Rosa may obtain loans from the Department of Housing and Urban Development (HUD) to acquire slum or

blighted areas, selected in accordance with a general redevelopment plan approved by HUD. The local agency can clear the land and sell or lease it for private or public redevelopment consistent with the approved redevelopment plan for the area. 42 U.S.C. 1452, 1455. The local agency, however, must dispose of the land "at its fair value for uses in accordance with the urban renewal plan," 42 U.S.C. 1460(c)(4). Fair reuse value is not necessarily the same as fair market value, because urban renewal land must be used in accordance with the urban renewal plan (see 42 U.S.C. 1455(b)), and the plan may impose restrictions that reduce the value of the land. Before urban renewal land may be transferred by any local agency, HUD must review the disposition agreement to ensure that the land is being sold or leased at its fair reuse value and to determine that the transaction complies with other HUD requirements (Pet. App. 358-359; Resp. App. 64).

Santa Rosa adopted a redevelopment plan for its downtown area in 1961 (Pet. App. 5; Resp. App. 2). This plan was subsequently approved by the federal government, which agreed to assist the plan through both loans and grants (Resp. App. 60, 3). In 1969, after an earthquake caused substantial damage in downtown Santa Rosa, the renewal area was expanded, and HUD agreed to provide funding for redevelopment in this additional area (*id.* at 60-61, 2). The city investigated the possibility that a private developer might construct a shopping center on a part of this "Phase II" land, and it tentatively selected respondent Hahn (*id.* at 5). Thereafter, HUD was

asked to approve the proposed disposition price to Hahn of $2 million (*id.* at 9, 64).[1] HUD was not a party to the disposition agreement or any other agreement between the city and Hahn (*id.* at 64).

Appraisals for the affected land were prepared in 1970 and 1972, and an updated appraisal was prepared in October 1975 at HUD's request. The 1975 appraisal concluded that the fair reuse value of the property was $1.8 million (Resp. App. 9, 67). A HUD realty specialist reviewed the appraisals, inspected the land, reviewed comparable sales, and ultimately recommended that HUD approve the $2 million sale price to Hahn (*id.* at 67-68). No conflicting appraisals were submitted to HUD, although petitioner had by that time commenced the present action and had examined the Hahn proposal and the earlier reuse appraisals.

In November 1975 HUD advised the renewal agency that it could proceed at the proposed price (Resp. App. 64). In December 1975 the renewal agency held a hearing to review the 1975 appraisal. No representative of petitioner appeared, and no conflicting appraisal evidence was offered. At the conclusion of the hearing, the agency unanimously approved the proposal (*id.* at 10).

Meanwhile, in 1966, petitioner adopted a master plan designating certain land in Rohnert Park as a site for development of commercial facilities, including a regional shopping center (Pet. App. 4). Within this area, petitioner owns two parcels of land. One is designated for use as a proposed library site (R. 912-913, 915); the other is adjacent to railroad tracks (R. 912-913). Much of the remaining land in this area is owned by Codding Enterprises or a related company (R. 910-911). Petitioner alleges that it has expended funds to improve the site by constructing streets, sewers and water mains (Pet. App. 4).

[1] Hahn was also to purchase additional land from Santa Rosa (R. 382). But this land had not been purchased by Santa Rosa with HUD funds, and HUD was not required to approve its resale to Hahn (R. 240-241).

2. Codding Enterprises, which owns land in Rohnert Park's commercial zone and which is financing the present action by petitioner (R. 917-921), filed several cases in Sonoma County Superior Court challenging the Santa Rosa project (R. 242-287, 874-875; Pet. App. 132-134, 226 & n.2, 234-235).[2] At about the same time, petitioner brought the present action in federal district court requesting declaratory and injunctive relief. Petitioner alleged that the effect of Santa Rosa's agreement with Hahn was to "subsidize [Hahn] by the use of public funds" and thereby "enhance and render impregnable the already dominant position which [Santa Rosa] and its merchants have in the retail merchandising industry in * * * the Santa Rosa Trade Area" (Pet. App. 7, 8). Petitioner asserted that the agreement therefore violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

Petitioner also asked for a declaration that the sale of land to Hahn at "less than the fair market value

[2] In one of these, the validity of HUD's determination of fair reuse value was decided adversely to Codding Enterprises. See Pet. App. 234-235 & n.8.

of the land for its highest and best uses permitted under the urban renewal plan" violated 42 U.S.C. 1460(c)(4) (Pet. App. 14). It therefore requested an injunction restraining the Secretary from approving the land disposition agreement.

3. After discovery was completed, the district court concluded that there were no genuine issues of material fact and granted the respondents' motions for summary judgment (Pet. App. 183-189). The court noted that petitioner did not claim that respondents had violated the Sherman Act by restrictive practices such as price fixing, or imposition of exclusionary clauses or territorial restraints. Instead, petitioner's claim, "pure and simple, is one of attempted preemption of future opportunities of others to compete by the planned construction of alleged excess retail store capacity" (Pet. App. 185). The court concluded that petitioner's attempt to characterize such alleged excess capacity as illegal, under the rationale of *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), must fail. In that case, Alcoa "abused its monopoly * * * [by attempting] to control that market by the continued expansion of its ingot production capacity to prevent others from entering the market" (Pet. App. 186). But here, respondents have no monopoly because they have not even commenced to build the planned shopping center. Moreover, even if the complaint were viewed as alleging an attempt to monopolize (for which a specific intent to monopolize must be established), "[petitioner] offers nothing from which a trier of fact can find such a specific intent. * * * Certainly the entirely lawful purpose to revitalize downtown Santa Rosa * * * could not sustain such a finding" (Pet. App. 187).

4. The court of appeals affirmed without reaching the merits of petitioner's claims, because the court concluded that petitioner lacks standing to sue (Pet. App. 220-240). The court held that petitioner, a local political subdivision "whose power is derivative and not sovereign" (Pet. App. 228, quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir.), cert. denied, 414 U.S. 1045 (1973)), cannot sue on behalf of its citizens under the Sherman Act as *parens patriae*. The court further held that petitioner's allegation that it has expended funds to improve its commercial zone does not give it standing under the Sherman Act and that petitioner also has failed to show any threat or harm to its proprietary interests as a property owner (Pet. App. 229). The court noted that, in view of the oversupply of retail floor space in the Santa Rosa area, any competition would be likely to adversely effect commercial development in Rohnert Park and that petitioner had not made a sufficient showing that the two city-owned plots, which are now apparently used for municipal purposes, would be selected as sites for commercial development in the future (Pet. App. 229-230).

With regard to the alleged Housing Act violations, the court concluded that the Housing Act does not create a private right of action against a city by an

adjacent city that does not own land within the redevelopment project. Applying the criteria established in *Cort* v. *Ash*, 422 U.S. 66 (1975),[3] the court decided that petitioner, as a neighboring city, is not "one of the class for whose *especial* benefit" (*id.* at 78) the Housing Act was passed (Pet. App. 234). Further, the legislative history of the Act suggests that Congress intended oversight by HUD, rather than private actions, as the means for enforcing local agency compliance with the fair price provisions. Permitting a private cause of action would hinder the purpose of the Act because it would delay renewal construction during the period of litigation. Moreover, there is an adequate private remedy under state law, for state "validating" proceedings provide a forum for challenging actions of the local urban renewal agencies (Pet. App. 234-235).

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[3] The Court there stated (422 U.S. at 78) (citations omitted; emphasis in original):

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Finally, the court of appeals held that petitioner lacks standing under the Administrative Procedure Act (APA) to claim that HUD has violated the Housing Act. Petitioner has not alleged that the Santa Rosa project would be abandoned or modified if a higher reuse value were ultimately determined for the land at issue. Further, petitioner has not alleged that businesses planning to locate at the Santa Rosa Shopping Center would instead choose to locate in Rohnert Park and that financing would be available to fund development in Rohnert Park. The court concluded that petitioner lacks standing because it has "failed to show that the prospective injury to its proprietary interest 'is likely to be reduced by a favorable decision'" (Pet. App. 239).

ARGUMENT

The decision of the court of appeals, on which we essentially rely, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1.*a.* Petitioner does not contend that the court of appeals erred in concluding that the Housing Act does not create a private right of action to challenge fair value determinations under 42 U.S.C. 1460(c)(4). This concession significantly limits petitioner's standing arguments. No other statute gives petitioner a cause of action against the private and state re-

spondents.[4] Petitioner's claims against these *non-federal* parties under the Housing Act could thus properly be dismissed even without inquiry into petitioner's standing. Where a cause of action does not exist, the issue of petitioner's standing to sue is also foreclosed. *Davis* v. *Passman*, 442 U.S. 228, 239-240 n.18 (1979); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974).

Petitioner's claim that HUD violated the Housing Act by approving the reuse agreement was also properly dismissed. Petitioner argues that the Administrative Procedure Act (APA) provides a cause of action against the agency to enforce the Housing Act and confers standing on every "person suffering legal wrong because of agency action," or "adversely affected or aggrieved by agency action within the meaning of [the] relevant statute." 5 U.S.C. 702. While the court of appeals agreed with this general proposition, it correctly held (Pet. App. 236-240) that petitioner is not within the class of aggrieved persons who have a direct stake in the controversy and are entitled to review of the agency's actions under the APA. See, *e.g.*, *United States* v. *SCRAP*, 412 U.S. 669, 686-690 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 731-741 (1972); *Data Processing Service* v. *Camp*, 397 U.S. 150, 153-158 (1970). Petitioner has failed to show that it would be likely to benefit

[4] The APA may, in appropriate circumstances, provide such a cause of action against the federal respondents. See Pet. App. 236.

in some tangible manner if the court granted the requested relief against HUD (see page 9, *supra*); petitioner's purely speculative inferences are insufficient to satisfy the standing requirement under either the APA or Article III of the Constitution. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976).

b. For essentially the same reasons, petitioner also lacks standing to pursue its claims under the Sherman Act. Section 16 of the Clayton Act confers standing on a broad, but not unlimited, class of persons to obtain an injunction against violations of the Sherman Act.[5] This provision has been construed as simply restating the "general rules of standing." See *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1174 (5th Cir. 1976). Under Section 16, suit may be brought by any person who has suffered a threatened loss or injury cognizable in equity, which proximately results from the alleged antitrust violation. See, *e.g.*, *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934, 938 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977); *Schwartz* v. *General Electric Co.*, 107 F. Supp. 58 (S.D.N.Y. 1952). Even taking all peti-

[5] Section 16 of the Clayton Act, 15 U.S.C. 26, provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity * * *.

tioner's assertions as true, and considering the evidence in the light most favorable to the petitioner (see *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), petitioner has failed to meet this standing requirement.[6] For petitioner has not alleged, and cannot establish, that the Santa Rosa project would be abandoned or modified if a higher reuse sale price were established. Moreover, petitioner's only proprietary interest is in the commercial property it owns in the shopping center. And, as the court of appeals correctly observed, petitioner has failed to allege that this land—which is primarily designated for a library site —will be available for commercial use, or that its value will be affected by the location of a regional shopping center (Pet. App. 229, 239). On the basis of the complaint, therefore, the court of appeals could properly conclude that petitioner has not shown standing under Section 16 of the Clayton Act.[7] *Simon* v.

[6] Contrary to petitioner's suggestion (Pet. 13-15, 18-19), it is not improper to decide the issue of standing upon a motion for summary judgment, rather than after a full trial. Standing is generally a preliminary matter (see, *e.g.*, *Santos* v. *District Council of New York City, etc.*, 547 F.2d 197, 199 (2d Cir. 1977)), and if the complaint, when considered together with any additional evidence in the case, does not adequately allege standing, the defendants are entitled to summary judgment. See, *e.g.*, *United States* v. *SCRAP*, *supra*, 412 U.S. at 686-690; *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 708, 714 n.22 (D.C. Cir. 1977); *Metcalf* v. *National Petroleum Council*, 553 F.2d 176, 189 n.126 (D.C. Cir. 1977).

[7] Petitioner's antitrust claim apparently does not seek to halt all shopping center development outside Rohnert Park, but only complains that "subsidized" development is a violation of the antitrust laws (see Pet. App. 7, 10). It is unclear why petitioner thinks the sale of the Phase II land, which HUD approved, is subsidized, since if the sale price is lower than the open market price, it is because of limits placed on the use of the land.

Eastern Kentucky Welfare Rights Organization, *supra*, 426 U.S. at 38.

Petitioner's claim (Pet. 21-25) that the decision in this case conflicts with decisions of this Court is without basis.[8] In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court held that a non-profit developer had standing to challenge a zoning decision that "st[ood] as an absolute barrier to constructing the housing" that the developer had contracted to build. *Id.* at 261. Here, by contrast, Santa Rosa has no authority to, and has not purported to, erect any barrier to the construction of a shopping center in Rohnert Park. This case is far closer on its facts to *Warth* v. *Seldin*, *supra*, on which petitioner also seeks

[8] Similarly, petitioner's claim (Pet. 19-20) that the decision below is in conflict with *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), is without basis. The Third Circuit there concluded that indirect purchasers had made a sufficient showing of proximate injury because "indirect purchasers can state unequivocally that under all circumstances prevalent in the real economic world, money is passing from their hands into the pockets of the price fixers as a result of the conspiracy." *Id.* at 593-594. Here, by contrast, petitioners entirely failed to show that "under all circumstances prevalent in the real economic world" they were being directly injured by the alleged violation; the effect of the alleged violation on petitioner's parcels is at best a matter of speculation.

to rely.[9] In *Warth*, the Court denied standing to non-residents who challenged a city's zoning restrictions, but who failed to show that removing the restrictions would allow them to purchase housing within the city. The plaintiffs in *Warth* lacked standing because they had established only a "remote possibility, unsubstantiated by allegations of fact" that their situation would be improved by the relief requested. 422 U.S. at 507-508. As in *Warth*, petitioner in this case also has failed to show that the relief it requests would result in commercial development of its property or in any other tangible benefit to its pecuniary interests.[10]

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[9] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), on which petitioner relies (Pet. 22-23), is also inapposite. Plaintiffs there challenged the constitutionality of the Price-Anderson Act, and alleged that, but for the protection of that Act, the nuclear facilities that were allegedly causing plaintiffs injury would not be completed and operated. Here, by contrast, petitioner simply has failed to reveal how the alleged Housing Act and antitrust violations have resulted in any injury to its pecuniary interests.

[10] In any event, petitioner's Sherman Act claim is frivolous and was correctly rejected by the district court. See *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936, 946 (6th Cir.), cert. denied, 414 U.S. 1068 (1973). HUD is not a party to any agreement with the non-federal defendants to construct a shopping center in Santa Rosa. HUD's participation simply fulfilled its statutory obligation to ensure that the resale price was correct, and that other HUD regulations were met. HUD's role in effect was that of a banker who makes a conditional loan to a person who is later accused of violating the antitrust laws; without further involvement, we do not believe the bank or HUD is liable under the antitrust laws for its customer's alleged violations. In particular, this Court has not ruled that the Secretary can be sued for violating the antitrust laws in circumstances where, as an employee of the federal government, he has acted within the scope of statutory duty. See, generally, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-363 (1977); *Parker* v. *Brown*, 317 U.S. 341 (1943).

In addition, we are not aware of any case where creation of "excess capacity", by itself, was found to violate the antitrust laws. As the district court correctly noted (Pet. App. 186), while Judge Hand discussed excess capacity in *United States* v. *Aluminum Co. of America, supra*, 148 F.2d at 429-431, that discussion was intended to show that Alcoa had abused its monopoly. This finding was necessary because mere possession of monopoly is not by itself enough to establish a violation of Section 2 of the Sherman Act. See, generally, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). Here, there can be no monopoly because the shopping center has not yet been built. And, if petitioner is attempting to allege an attempt to monopolize, the district court correctly observed that it had failed to allege facts showing the necessary element of specific intent (Pet. App. 186-187). See, *e.g.*, *Aluminum Co. of America, supra*, 148 F.2d at 432; *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). In the absence of such evidence, "the entirely lawful purpose to revitalize downtown Santa Rosa by the development of a regional shopping center that will deter a flight of population and business to the suburbs could not sustain such a finding" (Pet. App. 187).

Petitioner's claim under the Housing Act is also insubstantial. HUD based its approval on uncontradicted appraisal reports, and the district court properly refused to reverse the agency on the basis of appraisal evidence presented to that court that was never presented to either HUD or the renewal agency. This conclusion is confirmed by an intervening decision in state court proceedings (Pet. App. 234-235 & n.8) which held that the agency's conclusion that the Hahn contract was fair and equitable for the land according to its value for reuse was supported by substantial evidence and that HUD did not violate the Housing Act or its own regula-

2. Petitioner also contends that the court of appeals should have remanded the case to the district

court rather than deciding the question of standing on the appeal. But this contention is in error, for the question of standing is jurisdictional. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra*, 429 U.S. at 260. Moreover, there was an adequate record in the court of appeals for this issue to be determined. Contrary to petitioner's assertions here (Pet. 4-5, 13-15), the record clearly shows that petitioner's standing was raised in the district court in defendants' motions for summary judgment (Pet. App. 105, 108-111, 151-154, 159-160). Therefore, petitioner had "notice" of the issue and an "opportunity to produce admissible evidence demonstrating that there were genuine issues of material facts regarding the reality of its injury" (Pet. 4). Further, petitioner could have amended its complaint to overcome the specific shortcomings identified in the motions for summary judgment. Instead, petitioner chose to rely on the factual allegations contained in its original complaint (Resp. App. 75-76). Petitioner's claim of surprise on appeal is therefore unsupported.[11] Petitioner's assertion (Pet. 14-15) that

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tions. Indeed, the state court decision may well estop petitioner from pursuing its federal court claim, since the plaintiff in the state court actions (Codding Enterprises) has financed petitioner's current litigation (R. 917-920). See *Montana* v. *United States*, 440 U.S. 147, 154 (1979); Pet. App. 235 n.8.

[11] The cases petitioner cites concerning the proper disposition of factual issues raised for the first time on appeal (Pet. 14, 16, 17) are therefore inapposite. Likewise, *California Diversified Promotions, Inc.* v. *Musick*, 505 F.2d 278 (9th Cir. 1974), in which the district court dismissed a case *sua*

it should be given a chance to amend its complaint and litigate the issue anew in the district court is therefore without merit.

Petitioner also complains (Pet. 15-19) that the court of appeals should not have disposed of petitioner's Housing Act claim because the lower court had not decided the issue. But, although the district court did not discuss petitioner's Housing Act claim in its order, the district court did rule on that issue. It was presented by the complaint, and the district court dismissed the entire complaint, not just a portion of it. Compare Fed. R. Civ. P. 56(c) with Fed. R. Civ. P. 56(d). Petitioner's claims under the Housing Act were thus properly presented by the appeal and the court of appeals had jurisdiction to rule upon them. Cf. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 75 (1974).

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sponte without hearing, is not relevant here, because petitioner had ample opportunity to perfect its complaint. Moreover, this Court does not sit to resolve alleged intracircuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Petitioner's Reply to Brief for the Federal Respondent in Opposition

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SUBJECT INDEX

	Page
Reply	1
Whether the Housing Act Creates a Private Right of Action Is Irrelevant	2
Violation of Its Own Regulations by HUD	2
Petitioner Has Standing Under the Administrative Procedure Act	6
The Court of Appeals Cannot Dismiss for Lack of Standing Within the Context of this Case	9
Petitioner Has Standing to Seek Injunctive Relief Under Section 16, Clayton Act	9
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Pages
Armond Schmoll Inc. v. Federal Reserve Bank (1941) 37 N.E.2d 225, 286 N.Y. 503, cert. den. 315 U.S. 818, 86 L.Ed. 1215	6
Association of Data Processing Service Organization v. Camp (1970) 397 U.S. 150, 25 L.Ed.2d 184	6
Barlow v. Collins (1970) 397 U.S. 159, 25 L.Ed.2d 192	7
California Diversified Services Inc. v. Musick (C.A. 9) 505 F.2d 278 (1974)	9
City of Davis v. Coleman (C.A. 9) 521 F.2d 661 (1975)	6
City of Rohnert Park v. Patricia Roberts Harris, etc., et al. (C.A. 9) 601 F.2d 1040 (1979)	1
815 Mission Corp. v. Superior Court (1971) 22 C.A.3d 604	6
Fountain v. Filson (1949) 336 U.S. 681, 93 L.Ed. 971	9
Garrett v. City of Hamtramck (D.C. Mich.) 335 F. Supp. 16 (1971), 503 F.2d 1236, 399 F.Supp. 1151	4
Gibson & Perrin v. City of Cincinnati (C.A. 6) 480 F. 2d 936 (1973) cert.den. 414 U.S. 1068 (1973)	4, 5
Hunt v. Washington Apple Advertising Commission (1977) 432 U.S. 333, 53 L.Ed.2d 383	8, 11
Paschall v. Kansas City Star Co. (C.A. 8) 605 F.2d 403 (1979)	11
Singleton v. Wulff (1976) 428 U.S. 106, 49 L.Ed.2d 826	12
State of California v. Automobile Manufacturers Association (C.A. 9) 481 F.2d 122 (1973)	11

	Pages
United States v. Aluminum Co. of America (C.A. 2) 148 F.2d 416 (1945)	10
United States v. Williams (C.A. 5) 447 F.2d 1285 (1971)	3
Village of Arlington Heights v. Metropolitan Housing Development Corporation et al. (1977) 429 U.S. 252, 50 L.Ed2d 450	11
Warth v. Seldin (1975) 422 U.S. 490, 45 L.Ed.2d 343	9

Statutes

Administrative Procedure Act:	
5 U.S.C. 701 et seq.	6, 7, 8
5 U.S.C. 702	6
5 U.S.C. 706	6, 8
Clayton Act, 15 U.S.C. 12 et seq.	
Section 4 (5 U.S.C. 15)	10
Section 16 (5 U.S.C. 26)	5, 9, 10, 11
National Environmental Policy Act, 42 U.S.C. 4321 et seq.	10
National Housing Act, 42 U.S.C. 1441 et seq.	2
42 U.S.C. 1460(c)	2
42 U.S.C. 1460(c)(4)	6
Sherman Act, 15 U.S.C. 1, 2	11
28 U.S.C. 1254(1)	2

Rules of Court

Federal Rules of Civil Procedure:	
Rule 56(e)	3, 5

CODES	Pages
California Government Code	8
CONSTITUTIONS	
U.S. Constitution:	
Article III	8
REGULATIONS	
Department of Housing and Urban Development, Urban Renewal Handbook	2, 3, 4
Subparagraph (3)	4

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Respondents.

Petitioner's Reply to Brief for the Federal Respondent in Opposition

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

REPLY

On January 4, 1980, Petitioner City of Rohnert Park filed its Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision reported at 601 F.2d 1040. Jurisdiction of this

Court was and is invoked under the provisions of 28 U.S.C. 1254(1). On March 18, 1980, the Solicitor General of the United States, on behalf of Respondent United States Department of Housing and Urban Development (HUD), filed a "Brief For the Federal Respondent In Opposition" to the above-mentioned petition.

WHETHER THE HOUSING ACT CREATES A PRIVATE RIGHT OF ACTION IS IRRELEVANT

On page 9 of this Brief in Opposition, it is argued in support of the decision of the Court of Appeals that: "Petitioner does not contend that the Court of Appeals erred in concluding that the Housing Act does not create a private right of action to challenge fair value determinations under 42 U.S.C. 1460(c)" and that this "concession significantly limits petitioner's standing arguments * * *." This contention ignores that in the context of this case the question whether the Housing Act creates a private right of action is irrelevant. This is so for the reason that the record clearly shows that Respondent HUD, acting in concert with the "non-federal parties" violated the Housing Act and the regulations promulgated thereunder to reach an end forbidden under the antitrust laws. Hence, this is a case where the Respondents are attempting to reach an unlawful end through illegal means.

VIOLATION OF ITS OWN REGULATIONS BY HUD

Respondent HUD violated its own regulations in purporting to determine fair reuse value. (See App. pp. 347-367 for text of regulations, and particularly, pp. 365 to 367). In approving the land disposition price, Respondent HUD relied on materials which would not be admissible in support of its motion for summary judgment. For example, affidavits filed in support of HUD's motion for summary judgment disclose that its *concurrence* in the disposition price of $2,000,000 for the Phase II land ($100,000 per acre for 20 acres) was based on a recommendation made by Mr. Leeverne Johnson, a "Realty Specialist" employed by HUD.

Mr. Johnson's recommendation was in turn based on his review of two appraisals submitted to HUD, and a field review of the property. Mr. Johnson, by his own admission, has had *no* practical experience in real estate appraisal, and hence, could not qualify as an expert in this field. Accordingly, his recommendation cannot lend rational support to HUD's concurrence in the land disposition price. His recommendation is "hearsay in disguise," and therefore inadmissible. See *United States v. Williams* (C.A. 5) 447 F.2d 1285, 1290-1291 (1971).[1]

Moreover, no supporting affidavits based on personal knowledge of the authors of the appraisals (David Lane and Myers & Niethammer—Resp. App. p. 67) that Mr. Johnson reviewed were filed with the District Court. Therefore, there was actually no admissible evidence with respect to these appraisals before the District Court. Rule 56(e), Federal Rules of Civil Procedure.

The regulations of HUD (App. pp. 347-367) require *inter alia,* that appraisers be selected by Respondent Urban Renewal Agency, not Respondent HUD (App. p. 355). Furthermore, the appraisals "* * * shall be *reviewed* by a competent staff appraiser or private professional appraiser under contract to the (Respondent) Agency." (App. p. 365). By his own admission, Leeverne Johnson, an employee of HUD who reviewed the appraisals, could not qualify as a competent appraiser. He was merely a "Realty Specialist" (Resp. App. 66) with no practical experience as a profes-

1. Affidavit of Leeverne Johnson (Resp. App. p. 66).

sional appraiser, as he stated in his deposition. Nor, as shown by his deposition was he impressed by the fact that one of the two appraisals he reviewed, that of David Lane, declared the Hahn regional shopping center would, if built, enjoy a "monopoly position." Finally, Respondent Urban Renewal Agency did not adopt the resolution required by HUD's regulations (App. p. 366). Subparagraph (3) thereof requires a resolution which: "* * * Certifies that the work of the appraiser and the review appraiser has been performed in a competent manner in accordance with State law and HUD policies and requirements."

Accordingly, the argument of Respondent HUD that "* * * its participation simply fulfilled its statutory obligation to ensure that the resale price was correct * * *" (Fn. 10 on page 14 of its Brief In Opposition), is merely a disclaimer of its real responsibility. Such a disclaimer should not be tolerated. HUD must accept responsibility for the direction which an urban renewal program takes. To proceed, as it did here, by ignoring its own regulations and then claim innocence of what is being done with federal funds cannot be tolerated. *Garrett v. City of Hamtramck* (D.C. Mich.) 335 F.Supp. 16, 25 (1971), reversed for failure to make proper class certification and remanded. See 503 F.2d 1236 and 399 F.Supp. 1151 for order on remand. Thus, HUD may not wash its hands of the responsibility for complying with its own regulations by saying, as it did (id. p. 14) that it was not a party to any agreement with the non-federal Respondents to construct a regional shopping center. *Gibson & Perrin Co. v. City of Cincinnati* (C.A. 6) 480 F.2d 936 (1973), cert. den., 414 U.S. 1068 (1973), on which Respondent HUD relies, is inapposite. In that case, the federal defendants were voluntarily dismissed by plaintiffs who were then left with a claim of standing (1) as federal

taxpayers, (2) as persons having a personal stake in the outcome of the case and (3) as private attorneys general. The Court of Appeals, on the issue of standing, held only that "* * * persons located outside the Urban Renewal area * * *" do not have standing to "* * * question the design or location * * *" of buildings within that area (p. 941). Petitioner has not questioned the design or location of any buildings within the urban renewal area, nor has it challenged the redevelopment plan itself. The Court of Appeals did note, however, that plaintiff could have sought relief "* * * for violation of specific regulations adopted by the Secretary of HUD * * *," which is precisely what Petitioner has done here. On the antitrust issues, where plaintiff did not claim Section 16 (15 U.S.C. 26) standing, the *Gibson & Perrin* Court found no proof of competition.

One other specious claim by Respondent HUD deserves comment. On page 15 of its Brief In Opposition (Fn. 10), it attempts to leave this Court with the impression that the District Court acted properly on the basis of uncontradicted appraisal reports submitted to it, but not to HUD. In the first place, Petitioner filed the Affidavit of R. Dean Stahr in the District Court (App. p. 169) showing a fair reuse value substantially higher than that concurred in by HUD. Thus, Petitioner, by affidavit, has set forth specific facts showing there is a genuine issue for trial. Rule 56(e), Federal Rules of Civil Procedure. In the second place, Petitioner was not required to submit its appraisal to HUD or Respondent Urban Renewal Agency. Petitioner acted in compliance with Rule 56(e) by filing the Stahr affidavit in the District Court in opposition to Respondents' motions for summary judgment. The District Court cannot be said to have acted properly on the issue of fair reuse value. It did not even mention that issue for any purpose.

The notion that Petitioner should have submitted its appraisal evidence to Respondent Urban Renewal Agency is frivolous. Petitioner filed its complaint on November 19, 1974, *before* any of the validation proceedings (App. p. 234) were filed in state court by Codding Enterprises. Petitioner is not required to appear in a state court to challenge action of Respondent HUD. Indeed, HUD action could not be challenged there, since the Secretary could not be made a party to proceedings in the state court without his consent. *815 Mission Corp. v. Superior Court* (1971) 22 C.A.3d 604, 625. See also *Armond Schmoll Inc. v. Federal Reserve Bank* (1941) 37 N.E.2d 225, 227, 286 N.Y. 503, cert. den. 315 U.S. 818, 86 L.Ed. 1215.

PETITIONER HAS STANDING UNDER THE ADMINISTRATIVE PROCEDURE ACT

Since the District Court did not so much as mention the violation by HUD of 42 U.S.C. 1460(c)(4), Petitioner respectfully directs the attention of this Court to Sections 10 and 14 of the Administrative Procedure Act (5 U.S.C. 702, 706, both appearing at pp. 344 to 345 of Petitioner's Appendix and referred to hereinafter as APA). On the record in this case, Petitioner is entitled to relief from Agency action not in accordance with law and without observance of procedure required by law. It has shown injury in fact, economic or otherwise, from violation of a "relevant statute," to reach an end forbidden under the antitrust laws, and its interest is arguably within the zone of interests to be protected or regulated by the statute in question. *Association of Data Processing Service Organizations, Inc. v. Camp* (1970) 397 U.S. 150, 25 L.Ed.2d 184, *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975).

From *City of Davis,* supra, one can reasonably conclude that standing is not affected if "municipal interests" are

economic, which they clearly are, e.g., the power to tax and spend for municipal purposes. Moreover, Petitioner's "municipal interests" will be severely circumscribed by construction of the Hahn regional shopping center in Santa Rosa. Here, Respondent HUD had established an economic nexus with Petitioner City of Rohnert Park. In its Final Environmental Impact Statement (FEIS), where HUD considered Rohnert Park as an alternative site, it stated that there was not a large enough market to support two major shopping center areas. Consequently, the center on the less desirable site would suffer and perhaps fail.[2]

In its complaint, Petitioner alleged economic loss (App. p. 8), and it is plain from the material allegations of the complaint that the illegal actions of Respondents are the proximate cause of that loss by Petitioner—namely, the loss of approximately $1,200,000 which it raised and disbursed acting in its proprietary capacity and on behalf of itself and its property owners, taxpayers and inhabitants.[3] Petitioner respectfully submits that its municipal interests are entitled to the same protection that this Court extended to the economic interests of tenant farmers in *Barlow v. Collins* (1970) 397 U.S. 159, 25 L.Ed.2d 192. There, this Court held that tenant farmers were entitled to judicial review of regulations of the Secretary of Agriculture, and that said review was available to them under the Administrative Procedure Act (5 U.S.C. 701, et seq.). They had standing to sue, since they had the personal stake and interest that impart the concrete adverseness required by

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2. Page 125 of the FEIS, Exhibit 1 to Deposition of Michael Daugherty. Not included in Petitioner's Appendix.

3. These allegations were not "pierced" by any admissible evidence presented to the District Court by Respondents on motion for summary judgment.

Article III, U.S. Constitution, and fell within the zone of interests to be protected. Here, Petitioner can be said to have representational standing to sue under the Administrative Procedure Act to avoid not only irreparable economic loss but also a multiplicity of actions by the owners of property in Rohnert Park now zoned for commercial use—a regional shopping center. See *Hunt v. Washington Apple Advertising Commission* (1977) 432 U.S. 333, 53 L.Ed.2d 383. There, this Court noted on page 343:

> "Thus, we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requests, requires the participation of individual members in the lawsuit."

Petitioner respectfully submits that, as a municipal corporation, it meets the above quoted criteria and that dismissal by the Court of Appeals for lack of standing sanctions a gross departure from the accepted and usual course of judicial proceedings. Rohnert Park was and is a political subdivision of the State of California and formed pursuant to the provisions of the California Government Code. The Washington State Apple Advertising Commission was a state agency created by the State legislature. The municipal interests of Petitioner are entitled to at least as much protection from economic loss as the apple growers of the State of Washington. Having shown injury in fact, economic or otherwise, Petitioner has standing under the APA to seek protection from such loss by injunctive relief (5 U.S.C. 706).

THE COURT OF APPEALS CANNOT DISMISS FOR LACK OF STANDING WITHIN THE CONTEXT OF THIS CASE

In 1975, this Court held that for purposes of ruling on a motion to dismiss for lack of standing, both the trial and reviewing courts must accept as true all the material allegations of the complaint. *Warth v. Seldin* (1975) 422 U.S. 490, 501, 45 L.Ed.2d 343, 356. Here, the District Court did not so much as discuss standing,[4] and the Court of Appeals simply ignored the material allegations of Petitioner's complaint. Instead of reversing and remanding to give Petitioner an opportunity to amend, if need be, to show standing, it dismissed *sua sponte,* thereby denying Petitioner due process of law. This it cannot do. *Fountain v. Filson* (1949) 336 U.S. 681, 93 L.Ed. 971, and *California Diversified Services, Inc. v. Musick* (C.A. 9) 505 F.2d 278 (1974). Neither the Court of Appeals nor any one of the Respondents herein has claimed that Petitioner could not amend its complaint to state a claim for relief and standing to assert it.

PETITIONER HAS STANDING TO SEEK INJUNCTIVE RELIEF UNDER SECTION 16, CLAYTON ACT

Finally, Respondent HUD deals with the antitrust issues as though Petitioner had alleged a monopoly. However, this is not what Petitioner did. It alleged an attempt or conspiracy to monopolize and presented evidence of specific intent—actual knowledge by HUD that a 700,000 square foot regional shopping center would "* * * absorb most of the needed growth of commercial space in Santa Rosa until about 1990." (App. pp. 371-372). In actuality, the Hahn regional shopping center will be 835,000 square feet (App. p. 376), the 19.3% increase over 700,000 square feet being

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4. The District Court did *not* dismiss "the entire complaint" or any part of it as Respondent HUD claims on page 17 of its Brief in Opposition. It granted motions for summary judgment, and Petitioner appealed (App. p. 190).

excess capacity intentionally planned to exclude any privately financed shopping center in Rohnert Park. As Dr. Richard U. Ratcliff, in a reuse appraisal for the Santa Rosa Respondents, said in 1972 (App. p. 369): "* * * While the proposed Rohnert Park center is premature * * *, the actuality of the (Hahn) subject center (in Santa Rosa) *would kill off any possibility of a major development in Rohnert for a long time to come.*" (Emphasis added.)

In any event, Petitioner is not required to wait until the Hahn regional shopping center is built and then claim it has monopolized the relevant market for new retail space in the Santa Rosa Trade Area, as Respondent HUD suggests. Since excess capacity was planned as one of the preliminary steps to monopoly, the primary evil, it is dangerous and the law should "nip them in the bud." *United States v. Aluminum Company of America* (C.A. 2) 148 F.2d 416, 431 (1945).

Assuming *arguendo* that standing to sue for injunctive relief under Section 16, Clayton Act (15 U.S.C. 26) is jurisdictional, Petitioner submits that it had *no* opportunity to amend its complaint. The "notice" to which Respondent HUD adverted (p. 16, Federal Respondent's Brief In Opposition) dealt only with standing under the National Environmental Policy Act, standing to challenge an urban renewal plan, which Petitioner did not do; and standing under Section 4, Clayton Act (15 U.S.C. 15), the treble damage provision, which is not involved here. (App. pp. 105, 107-112, 151-154, 159-160). The only discussion of Section 16 dealt with standing of Petitioner as *parens patriae* (Resp. App. pp. 170-172), a status it has never claimed.

Petitioner respectfully submits that it has shown the *threatened* "loss or damage" required under Section 16, Clayton Act (15 U.S.C. 26) and that it has the right to be

free of anticompetitive practices illegal under the Sherman Act (15 U.S.C. 1, 2). Vindicating the public interest in enforcement of the antitrust laws must be considered on the same footing as the right of persons to be free of arbitrary and irrational zoning actions. *Village of Arlington Heights v. Metropolitan Housing Development Corporation et al.* (1977) 429 U.S. 252, 50 L.Ed. 450. Petitioner submits that the representational standing in *Hunt,* supra, should be considered together with its standing under Section 16 to vindicate such of its own interests as are "congruent with the interests of" its "inhabitants." *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973).

In conclusion, Petitioner submits that it has alleged facts and presented evidence sufficient to show threatened loss or damage by a violation of the antitrust laws and that such threatened fact of injury is causally related to Respondents' pending antitrust violations. *Paschall v. Kansas City Star Co.* (C.A. 8) 605 F.2d 403, 408 (1979).

CONCLUSION

The Petition For Writ of Certiorari should be granted for all the reasons set forth therein,[5] and in Petitioner's Reply to the Brief In Opposition of the two Santa Rosa Respondents and in this Reply to the Federal Respondent's Brief In Opposition.

April 2, 1980

Respectfully submitted,

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RICARDO J. HECHT

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Attorneys for Petitioner

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5. This Court has the inherent power to supervise the administration of justice in the lower courts, particularly where, as here, the Court of Appeals remanded for dismissal *sua sponte*. By deciding that Petitioner lacked standing to sue and doing so without notice or an opportunity to be heard, the Court of Appeals denied to Petitioner due process of law. This, it cannot do. *Singleton v. Wulff* (1976) 428 U.S. 106, 49 L.Ed.2d 826.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Petitioner's Reply to Brief For The Federal Respondent In Opposition were mailed postage prepaid to the counsel of record of Respondents as stated below:

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

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Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

Page

Pertinent Statutes 1

Questions Presented 1

Statement Of The Case 2

Summary Of The Arguments 13

Reasons For Denying The Writ 14

I. The Arguments of the Parties on the Issue of Standing Were Fully Developed Before the District Court, and the Decision of the Court of Appeals on This Issue was Based on the Uncontroverted Pleadings and Evidence Presented to the District Court by Both Petitioner and Respondents. The Court of Appeals' Adoption of Different Reasons Than the Trial Court for the Conclusion That Petitioner was not Entitled to Sue did not Constitute a Departure From the Accepted Course of Judicial Proceedings nor a Denial of Due Process of Law 14

II. The Decision of the Court of Appeals Follows and Appropriately Applies the Minimum Requirements for Standing of Article III and the Accepted Principles for Determining Standing Under Section 16 of the Clayton Act. Neither the Decision of the Third Circuit Referred to by Petitioner nor the Decisions of This Court Conflict With the Decision Below nor Have any Such Decisions Found Standing in Factual Circumstances Where the Alleged Injury of the Plaintiff was as Remote and Speculative as the Injury Alleged by Rohnert Park or the Consequences of Judicial Intervention as Conjectural or Hypothetical 19

III. Certiorari Should be Denied Because the Decision of the Court of Appeals can be Sustained on Numerous Alternative Grounds, Including the Grounds on Which the Case was Decided by the District Court and the Grounds Set Forth in the First Opinion of the Court of Appeals 30

Conclusion 37

TABLE OF AUTHORITIES CITED

Cases

Pages

Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, 50 L.Ed.2d 450 22

Berman v. Parker (1954) 348 U.S. 26, 99 L.Ed. 27 33

Boothe v. Hickel (D.C. Nev.) 347 F.Supp. 1273 (1969) 17

British Airways Bd. v. Port Authority of New York (C.A. 2) 558 F.2d 75 (1977) 18

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977) 429 U.S. 477, 50 L.Ed. 2d 701 22-23

Buckley Towers Condominium, Inc. v. Buchwald (C.A. 5) 533 F.2d 934 (1976) 28

California Diversified Promotions, Inc. v. Musick (C.A. 9) 505 F.2d 278 (1974) 18

City of Davis v. Coleman (C.A. 9) 521 F.2d 661 (1975) 26

Daily Press, Inc. v. United Press International (C.A. 6) 412 F.2d 126 (1969) 18

Denton v. Mr. Swiss of Missouri, Inc. (C.A. 8) 564 F.2d 236 (1977) 18

Duke Power Co. v. Carolina Env. Study Gp. (1978) 438 U.S. 59, 57 L.Ed.2d 595 ..... 22, 25

Ernest W. Hahn, Inc. v. Codding (D.C. N.D. Ca.) 423 F.Supp. 913 (1976) ..... 3 (Fn. 2)

Fellom v. Redevelopment Agency (1958) 157 Cal.App.2d 243, 320 P.2d 884 35

First Nat. Bank v. Cities Service Co. (1968) 391 U.S. 253, 20 L.Ed.2d 569 18

Franke v. Midwestern Okl. Development Authority (W.D. Okl.) 428 F.Supp. 719 (1976) 17

Heirs of Fruge v. Blood Services (C.A. 5) 506 F.2d 841 (1975) 18

Helena Rubinstein, Inc. v. Bau (C.A. 9) 433 F.2d 1021 (1970) 19

Hormel v. Helvering (1941) 312 U.S. 552, 85 L.Ed. 1037..... 18

In re Redevelopment Plan for Bunker Hill (1964) 61 Cal.2d 21, 37 Cal.Rptr. 74, 389 P.2d 538 33

In re Western Liquid Asphalt Cases (C.A. 9) 487 F.2d 191 (1973), cert. denied 415 U.S. 919, 39 L.Ed.2d 474 17

Irwin v. City of Manhattan Beach (1966) 65 Cal.2d 13, 51 Cal.Rptr. 881, 415 P.2d 769 27

Jaffke v. Dunham (1957) 352 U.S. 280, 1 L.Ed.2d 314 18

John Lenore & Co. v. Olympia Brewing Co. (C.A. 9) 550 F.2d 495 (1977) 17

Lafayette v. Louisiana Power & Light Co. (1978) 435 U.S. 389, 55 L.Ed.2d 364 ..... 32, 34

Langnes v. Green (1931) 282 U.S. 531, 75 L.Ed. 520 30

Mid-West Paper Products Co. v. Continental Group (C.A. 3) 596 F.2d 573 (1979) 23-24

Montana v. United States (1979) ____ U.S. ____, 59 L.Ed.2d 210 30-31

O'Loane v. O'Rourke (1965) 231 Cal.App.2d 774, 42 Cal.Rptr. 283 27

O'Shea v. Littleton (1974) 414 U.S. 488, 38 L.Ed.2d 674 . 20, 25

Parker v. Brown (1943) 317 U.S. 341, 87 L.Ed. 315 .....11, 15, 31-32

Paskaly v. Seale (C.A. 9) 506 F.2d 1209 (1974) 19

Schlesinger v. Reservists to Stop the War (1974) 418 U.S. 208, 41 L.Ed.2d 706 ..... 25, 29

Simon v. Eastern Ky. Welfare Rights Org. (1976) 426 U.S. 26, 48 L.Ed.2d 450 25

Singleton v. Wulff (1976) 428 U.S. 106, 49 L.Ed.2d 826 18

State of California v. Automobile Manufacturers Association, Inc. (In re Multidistrict Vehicle Air Pollution M.D.L. No. 31) (C.A. 9) 481 F.2d 122 (1973), cert. denied 414 U.S. 1045, 38 L.Ed.2d 336 9

State of Washington v. Automobile Manufacturers Association (In re Multidistrict Vehicle Air Pollution) (C.A. 9) 538 F.2d 231 (1976) 10-11, 16

Tilden Financial Corp. v. Palo Tire Serv., Inc. (C.A. 3) 596 F.2d 604 (1979) 18

Tugboat, Inc. v. Mobile Towing Co. (C.A. 5) 534 F.2d 1172 (1976) 24

United States v. Aluminum Co. of America (C.A. 2) 148 F.2d 416 (1945) 10-11

United States v. General Motors Corporation (C.A. D.C.) 518 F.2d 420 (1975) 19

United States v. Johnston (1925) 268 U.S. 220, 69 L.Ed. 925 20

Warth v. Seldin (1975) 422 U.S. 490, 45 L.Ed.2d 343 ..... 12, 17, 19, 20, 22, 25, 26, 28, 29

Statutes

Administrative Procedure Act (5 U.S.C. 551 et seq.):
5 U.S.C. 702 ..... 2, 12
5 U.S.C. 706 ..... 2, 12

Clayton Act (15 U.S.C. 12 et seq.):
Section 16 (15 U.S.C. 26) 1, 9-11, 13, 16, 19, 23-25

Federal Housing Act of 1979, as amended (42 U.S.C. 1441 et seq.):
42 U.S.C. 1441 et seq. 4, 12, 16, 29
42 U.S.C. 1460 (c) (4) 2, 5, 7, 10, 29

Sherman Act (15 U.S.C. 1 et seq.):
15 U.S.C. 1 et seq. 10-11, 35
Section 1 (15 U.S.C. 1) 1, 5, 36
Section 2 (15 U.S.C. 2) 1, 5, 36
Section 4 (15 U.S.C. 4) 23

Codes

California Code of Civil Procedure:
Section 860 1
Section 869 ..... 1, 31
Section 870 ..... 1, 31

California Government Code:
Division 2, Part 1 27
Section 61000-66390 27
Section 66241 28

California Health & Safety Code:
Section 33000 et seq. 4, 34
Sections 33030-33032 35
Section 33037 35
Section 33100 34
Section 33433 ..... 5, 7, 10
Section 33501 1
Section 33502 1
Section 33503 ..... 1, 31

Constitutions

U.S. Constitution:
Article III 12, 14, 19-20, 23

Regulations

U.S. Department of Housing and Urban Development:
Urban Renewal Handbook Section 7214.1 ..... 5, 7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,

Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TO the HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Respondents City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (now known as the Redevelopment Agency of the City of Santa Rosa) respectfully pray that the petition of City of Rohnert Park for a writ of certiorari to review the Opinion and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 26, 1979 be denied.

PERTINENT STATUTES

1. California Health and Safety Code sections 33501, 33502 and 33503;

2. California Code of Civil Procedure sections 860, 869 and 870.

Copies of these statutes appear in the Appendix to this Brief at pp. 207 through 212.[1]

QUESTIONS PRESENTED

Respondents City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (the "Santa Rosa Respondents") agree with Petitioner that this case raises the questions:

1. Whether Petitioner has standing to seek injunctive relief under section 16 of the Clayton Act (15 U.S.C. 26) for threatened loss or damage under section 1 and section 2 of the Sherman Act (15 U.S.C. 1 and 2); and

2. Whether, within the context of this proceeding, Petitioner has standing to seek relief under the Ad-

[1] References to App. are to the Appendix to the Petition; references to R.App. are to the Appendix to this Brief in Opposition to the Petition.

ministrative Procedure Act (5 U.S.C. 702, 706) for an alleged violation by Respondent Secretary of Housing and Urban Development of 42 U.S.C. 1460(c) (4) and regulations thereunder (App. pp. 347-367) — sale of land within a federally financed urban renewal project for less than its "fair value."

The Santa Rosa Respondents do not agree that the purported description of the proceedings before the District Court and Court of Appeals set forth on pages 3 through 5 of the Petition accurately reflects the proceedings below, and, for the reasons set forth in the following *Statement Of The Case* and *Reasons For Denying The Writ,* the Santa Rosa Respondents deny that the other questions set forth on pages 5 and 6 of the Petition are presented by this case.

STATEMENT OF THE CASE

Petitioner City of Rohnert Park is a municipal corporation. Petitioner has adopted a general plan that designates certain property within Petitioner's municipal boundaries for commercial development, a designation which permits the development of a regional shopping center on the site. (App. p. 4.) Freeway access is provided to the site by an interchange that was financially subsidized by special grants of federal and state funds totaling $842,000. (R.App. p. 113.) The development of a regional shopping center at the Rohnert Park site would violate the objectives of the regional plan of the Association of Bay Area Governments, the multi-jurisdictional regional planning agency for Petitioner and Respondent City of Santa

Rosa. (R.App. pp. 116-118.)

The principal owner of the Rohnert Park site is Codding Enterprises. Codding Enterprises is also the operator of the only existing regional shopping center in the Santa Rosa area. In early 1973, Codding Enterprises requested that the selection of the developer for a proposed regional shopping center in the Santa Rosa Center Urban Renewal Project be delayed until its president finished his term on the Santa Rosa City Council so that Codding Enterprises could compete for the development opportunity. The Respondent Urban Renewal Agency denied the request and tentatively selected Respondent Ernest W. Hahn, Inc. ("Hahn") as the developer. (R.App. pp. 4-6.)

Since being rejected as the developer for the Santa Rosa site, Codding Enterprises has brought or sponsored more than a dozen lawsuits against the urban renewal project. (R.App. pp. 38-41.) The discovery in this lawsuit disclosed that Codding Enterprises had paid all the attorneys' fees and costs of the City of Rohnert Park through donations to the Rohnert Park Chamber of Commerce. (R.App. pp. 54-58.) The principal impact of these lawsuits and of lis pendenses recorded based on the lawsuits has been to obstruct the public and private financing for the Santa Rosa project.[2]

The Santa Rosa Center Project is located in the center of downtown Santa Rosa. The original 40-acre project adopted in 1961 ("Phase I") was expanded ("Phase II") to approximately 71 acres in 1970 after an

[2] The effect of these lawsuits is more fully described in *Ernest W. Hahn, Inc.* v. *Codding* (D.C. N.D. Ca.) 423 F.Supp. 913 (1976).

earthquake caused major structural damage to buildings in the area. (R.App. pp. 2-3.) Both Phase I and Phase II of the project have received financial assistance under the Federal Housing Act of 1949, as amended (42 U.S.C. 1441 et seq.), pursuant to a loan and grant contract between the Urban Renewal Agency ("Agency") and the predecessor of the United States Department of Housing and Urban Development ("HUD").

Negotiations between Hahn and the Agency during 1973 and 1974 led to a proposal that the project be enlarged by an area of approximately 10 acres to accommodate the shopping center. After completion of the procedures required for the amendment of a redevelopment plan under the California Community Redevelopment Law (Health and Safety Code section 33000 et seq.), the Santa Rosa City Council, on October 29, 1974, adopted an ordinance adding this area, known as Phase III, to the project. (R.App. pp. 6-8.) Phase III does not receive financial assistance under the Housing Act. (R.App. pp. 3, 65.)

On October 29, 1974, the Respondents took several other actions directed toward the accomplishment of the shopping center redevelopment. The City Council and the Agency approved and adopted an environmental impact report for the project. The City Council tentatively approved an amendment to the redevelopment plan making certain street changes and property right adjustments to accommodate the shopping center, and the Agency tentatively approved the contract for sale and development of the 30-acre shopping center site (21 acres in the federal project area and 9 acres in

Phase III).

Shortly thereafter, in November of 1974, Petitioner City of Rohnert Park filed this lawsuit. The complaint alleged that the proposed sale by the Agency to Hahn was for less than fair value in violation of 42 U.S.C. 1460(c)(4), Urban Renewal Handbook section 7214.1, and California Health and Safety Code section 33433, that the Respondent Secretary of HUD could not advance funds to the Agency or approve the contract between the Agency and Hahn prior to preparation of an environmental impact statement for the project, and that the agreement between the Agency and Hahn, if carried out, would be an attempt to monopolize and a combination or conspiracy to monopolize interstate trade or commerce in Sonoma County or some part thereof in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). (App. pp. 1-17.)

In December of 1974, Codding Enterprises filed an *in rem* validating proceeding in the Sonoma County Superior Court against the same contract between the Agency and Hahn. Codding Enterprises also alleged that the proposed sale to Hahn would violate state and federal antitrust laws and was a sale for less than fair value in violation of 42 U.S.C. 1460(c)(4), section 7214.1 of the Urban Renewal Handbook, and Health and Safety Code section 33433. (R.App. pp. 40-41.)

During late 1974 and early 1975, the Respondent Secretary of HUD prepared and approved an environmental impact statement for the project. Because of the delay occasioned by this process, a new appraisal for the property to be sold to Hahn was prepared by David E. Lane, MAI, an independent appraiser. Ear-

lier independent appraisals for the site had been obtained between 1970 and 1972, and reviewed by David E. Lane in 1973. Lane's 1975 updated appraisal — which established a value of $1,829,520 for the property in Phase II to be conveyed to Hahn — and the earlier appraisals were submitted to HUD and reviewed by Leevern Johnson, a HUD realty specialist. Mr. Johnson conducted a field review to insure the factual accuracy of the Lane appraisals, and found the appraisals to be "in accordance with HUD requirements." (R.App. p. 67.) On November 6, 1975, HUD concurred with the $2 million land price for the 21 acres in Phase II to be conveyed to Hahn and with the Hahn contract.

At a noticed public hearing on December 1, 1975, the Agency considered the appraisal evidence and testimony of Mr. Lane, the HUD approval, and other evidence pertinent to the Hahn contract and its land sale price. Based on this evidence, the Agency determined the sale price to Hahn was for not less than fair value for uses in accordance with the redevelopment plan and authorized the execution of the agreement with Hahn. (R.App. pp. 10, 16-18.) Counsel for Petitioner were personally informed of the December 1, 1975 hearing but did not present any appraisal evidence for the consideration of the Agency. (R.App. pp. 16-18, 41.)

The Hahn contract, as finally approved by the Agency and HUD, requires that Hahn, in addition to paying the land purchase price, pay other costs estimated to total $7.5 million (primarily for parking facilities to be available to the public without charge), pay various fees, and develop the shopping center in

compliance with plans approved by the Agency. (R.App. pp. 23-24, 26-28.) Ernest Hahn testified at the October 29, 1974 hearing and at the December 1, 1975 hearing that the total costs of Hahn for the development of the Santa Rosa shopping center would exceed the costs of a similar center in a suburban location, such as the Rohnert Park site, by $5.6 million to $6 million. (R.App. pp. 14, 17-18.)

In May of 1976, the validating proceeding on the project and the Hahn contract was tried before the Sonoma County Superior Court. In connection with the judgment entered in December of 1976, the state Court made the following conclusions of law:

> "3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record.
>
> "4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the redevelopment project area for not less than its fair value for uses in accordance with the redevelopment plan." (R.App. p. 142.)

The Sonoma County Superior Court also concluded that the Hahn contract and the proposed expenditures of public funds for the project did not constitute ". . . a

monopoly, unlawful discrimination, an unfair practice or unfair competition," and that:

> "Neither the redevelopment plan as now amended, nor the Hahn Contract, nor any other contract or action contested by plaintiffs, is a contract, combination, or conspiracy in restraint of trade, or an action in furtherance of a contract, combination or conspiracy in restraint of trade." (R.App. pp. 143-144.)

On appeal from the trial court judgment, the California District Court of Appeal affirmed the trial court except to require more detailed findings for the ordinance and resolution approving the environmental impact report for the project. The state Court of Appeal sustained the trial court judgment validating the Hahn contract and all other substantive actions taken by the Santa Rosa Respondents to expand the project area and amend the redevelopment plan. (R.App. pp. 190-198.) The California Supreme Court denied a Petition for Hearing of Codding Enterprises. After remand, the Sonoma County Superior Court reaffirmed that the trial court judgment validating the Hahn contract remained final and binding by ruling that a lis pendens recorded against the Santa Rosa site based on the validating proceeding must be expunged because the suit no longer involved "title to or right of possession of the real property." (R.App. pp. 203-205.)

In October 1976, the Respondents in this case moved for dismissal and for summary judgment. Each of the Respondents argued before the District Court that Petitioner lacked standing to sue. (App. pp. 90-93, 107-112, 151-154, 159-160; R.App. pp. 106-108, 170-172.) In support of this argument, Respondents offered a

partial transcript of deposition testimony by Mr. Peter Callinan, the City Manager of Petitioner, which showed that Rohnert Park had no ownership or other interest in the property of the Santa Rosa project, did not pay taxes to Santa Rosa or the federal government, and had no obligation that would be increased by the proposed Santa Rosa development. (R.App. pp. 46-53.) Mr. Callinan's testimony further established that the property interest of Petitioner in the Rohnert Park land designated for commercial development consisted of the ownership of a library site donated to the City by Codding Enterprises and the ownership of a wastewater treatment plant site outside the area of the proposed regional commercial development.

In response to this evidence, Petitioner presented the Affidavit of Roland L. Brust, Petitioner's Director of Public Works. (App. pp. 173-178.) Mr. Brust's affidavit showed that Petitioner had formed an assessment district for public improvements in the area of the Rohnert Park site.

Relying on Mr. Brust's affidavit and on the allegation that the development of a shopping center in Santa Rosa would cause sales tax revenues to accrue to Santa Rosa rather than to Rohnert Park, Petitioner argued that it possessed standing to sue under section 16 of the Clayton Act to vindicate such of its "'own proprietary interest(s)' as are 'congruent with the interest of' its 'inhabitants'," even though the relief sought might be unrelated to competition. *State of California* v. *Automobile Manufacturers Association, Inc. (In re Multidistrict Vehicle Air Pollution M.D.L. No. 31)* (C.A. 9) 481 F.2d 122 (1973), cert. denied 414

U.S. 1045, 38 L.Ed.2d 336, and *State of Washington* v. *Automobile Manufacturers Association (In re Multidistrict Vehicle Air Pollution)* (C.A. 9) 538 F.2d 231 (1976). R.App. pp. 76-79.) Petitioner elaborated its arguments on section 16 standing in a supplemental brief submitted to the District Court. (R.App. pp. 154-157.)

In the motions to dismiss and for summary judgment, Respondents also asserted that the evidence set forth in affidavits presented to the District Court established that the sale to Hahn was properly and lawfully approved and was not for less than fair value in violation of 42 U.S.C. 1460(c)(4), Urban Renewal Handbook section 7214.1, or Health and Safety Code section 33433; that because the challenged conduct of the federal and Santa Rosa Respondents was lawful governmental action, taken pursuant to legislative mandates, Petitioner could not claim redress for any alleged violation of the Sherman Act; and that the Petitioner's bare allegation that Respondents proposed to develop new commercial retail facilities in excess of existing demand failed to state a Sherman Act claim for which relief could be granted. (R.App. pp. 162-170.) The Santa Rosa Respondents further argued that Petitioner's claims were barred by the state court validating proceeding and that Petitioner's allegation that the Hahn contract afforded an unfair competitive advantage to Hahn was conclusively refuted by evidence submitted to the District Court. (App. pp. 140-146.) (R.App. pp. 162-165.)

The Order Granting Summary Judgment of the District Court focused upon *In re Multidistrict Vehicle Air Pollution*, supra, the source of Petitioner's rationale for its standing claim, and on *United States* v. *Aluminum Co. of America* (C.A. 2) 148 F.2d 416 (1945), the purported basis of Petitioner's contention that the construction of excess retail capacity constituted a violation of the Sherman Act. The Court observed that *In re Multidistrict Vehicle Air Pollution*, supra, affords a right to injunctive relief only where the plaintiff can establish an on-going violation of the antitrust laws. The Court also noted that *Alcoa* condemned not the creation of excess capacity *per se* but rather such conduct when done to perpetuate a monopoly. Since the allegations and the evidence before the Court showed neither that Respondents had a monopoly nor any predatory conduct which would support a finding of specific intent to monopolize, the Court concluded that Petitioner had offered nothing from which a trier of fact could find or infer an on-going violation of the antitrust laws. The Court further concluded that the conduct complained of by Rohnert Park consisted of the exercise of lawful duties and authorities by government agencies and officials, for which relief was barred by *Parker* v. *Brown* (1943) 317 U.S. 341, 351, 87 L.Ed. 315, 326. (App. p. 187.)

The final opinion of the Court of Appeals, like the decision of the District Court, focused upon Petitioner's standing argument derived from *In re Multidistrict Vehicle Air Pollution*, supra. The Court opined that to support its claim of standing under section 16, Rohnert Park was required to show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from an alleged antitrust violation.

By finding no antitrust violation, the District Court had implicitly rested its decision on the second of these two requirements. The Court of Appeals concluded that Rohnert Park failed both tests.

The Court of Appeals declared that Rohnert Park, as a municipal subdivision, could not sue as *parens patriae* to protect the interests of its citizens who might be injured by loss of investment profits or tax revenues. And it was not clear from the allegations and evidence how, if at all, Rohnert Park's own proprietary interest in a library site and a site set aside for a wastewater facility would be adversely affected by the construction of a regional shopping center in Santa Rosa. (App. pp. 228-229.) By analogy to *Warth* v. *Seldin* (1975) 422 U.S. 490, 45 L.Ed.2d 343, the Court of Appeals reasoned that Rohnert Park had failed to demonstrate an injury "proximately resulting from an antitrust violation" because the alleged adverse effect on Rohnert Park would result from any competition in the relevant market, whether or not the competition violated the antitrust laws or the Housing Act, and because the supposition that Rohnert Park would benefit if a sale to Hahn for less than fair value was voided or enjoined was entirely speculative. (App. p. 230.) Judicial relief would not bar continuing competition.

The Court of Appeals employed similar reasoning in rejecting the Petitioner's claim of standing under the Administrative Procedure Act (5 U.S.C. 702, 706). The Court found that Rohnert Park failed to meet the minimum constitutional case or controversy requirement for standing of Article III because the relationship between the alleged potential injury to Rohnert

Park and the alleged illegal land sale approvals was too attenuated; there was no showing that prospective injury was "likely to be reduced by a favorable decision," and the scenario that would avert the injury was too "conjectural" and "hypothetical." (App. pp. 239-240.)

SUMMARY OF THE ARGUMENTS

The petition for writ of certiorari should be denied because Petitioner had an opportunity to present evidence and arguments on the issue of standing to the District Court and exercised that opportunity. The Court of Appeals based its decision that Petitioner lacked standing to sue upon uncontroverted allegations and evidence presented. The appellate court's adoption of different reasons than the District Court for reaching the same conclusion that Petitioner was not entitled to sue did not constitute a departure from the accepted course of judicial proceedings nor a denial of due process of law.

The Court of Appeals applied well-established principles in determining that Petitioner's claims failed to satisfy the minimum constitutional requirements of a case or controversy and that Petitioner lacked a sufficient interest to invoke Section 16 of the Clayton Act. Neither the decisions of this Court nor those of the Courts of Appeals conflict with the conclusion that the putative injury of the Petitioner is too remote and speculative and the consequence of judicial intervention too conjectural to give Petitioner standing to sue.

The decision of the Court must also be sustained, and the petition for certiorari denied, because the Petitioner failed to state a cause of action, because the

Petitioner is collaterally estopped from raising the claims made in this case, and because uncontroverted evidence presented in the District Court established that certain allegations of the complaint essential to Petitioner's claims are untrue.

REASONS FOR DENYING THE WRIT

I

The Arguments of the Parties on the Issue of Standing Were Fully Developed Before the District Court, and the Decision of the Court of Appeals on this Issue was Based on the Uncontroverted Pleadings and Evidence Presented to the District Court by Both Petitioner and Respondents. The Court of Appeals' Adoption of Different Reasons Than the Trial Court for the Conclusion That Petitioner was not Entitled to Sue did not Constitute a Departure From the Accepted Course of Judicial Proceedings nor a Denial of Due Process of Law.

As a first reason why certiorari should be granted, Petitioner asserts that it was wrongfully denied notice and an opportunity to be heard, and deprived of due process of law, by the Court of Appeals' determination that the relationship between the Petitioner's claimed injury and the alleged illegal approval of the Hahn land sale price was too attenuated to meet minimum Article III standing requirements. Petitioner contends the Court of Appeals was required to accept the conclusory allegation of Paragraphs V(b) and VIII(b) of the Complaint that the consequence of the Respondents' approval of the sale price to Hahn would be to eliminate actual and potential competition, "all to the irreparable loss or damage of Plaintiff City." (Petition

pp. 17-18.) Petitioner charges that the Court of Appeals' refusal to accept these conclusory assertions as fact, and the Court's determination that the alleged interest and injury of Rohnert Park were too conjectural to justify relief, constituted an impermissible finding of fact on an issue not addressed by the District Court. According to Rohnert Park, the Court of Appeals could not order dismissal of the case unless there was no possibility that Petitioner could amend the complaint to state a claim for relief and standing to assert it. (Petition p. 15.)

The fundamental fallacy of Rohnert Park's argument is its erroneous presupposition that the issue of standing was not argued before the District Court. In the District Court, the Respondents offered the deposition testimony of Mr. Callinan and Petitioner offered the affidavit of Mr. Brust to show facts relevant to the issue of standing. While the evidence of the Santa Rosa Respondents may not have "pierced" the allegations of the complaint concerning the inhibiting effects of the Santa Rosa shopping center upon Rohnert Park developers, the Respondents did conclusively refute the "reality" of the Petitioner's injury with undisputed evidence that Petitioner's only proprietary interest in the Rohnert Park site was the ownership of the donated library site, that Hahn did not have a competitive advantage — unfair or otherwise — over Rohnert Park developers and merchants, and that the HUD and Agency approvals of the Hahn contract complied with all laws and regulations referred to by Petitioner. All parties extensively argued the issue of standing in briefs to the District Court.

The District Court granted summary judgment because Petitioner failed to allege facts demonstrating an on-going antitrust violation, a necessary prerequisite to Clayton Act section 16 relief under *In re Multidistrict Vehicle Air Pollution,* supra, the decision Petitioner primarily relied upon for its assertion of standing. By further concluding that *Parker* v. *Brown*, supra, barred Petitioner from relief, the District Court implicitly resolved that the conduct of the local and federal government Respondents did not violate the Housing Act.

Petitioner did not request a rehearing, did not request leave to introduce additional evidence, and did not request leave to file an amended complaint at any time during the proceedings in the District Court. In fact, Petitioner was so satisfied with the evidence and arguments it presented to the District Court on the issue of standing that its brief in opposition to the summary judgment motion stated:

> "At pages 23-33 of their brief, the Santa Rosa defendants argue that plaintiff lacks standing to sue. This argument is dealt with fully at pages 1-6 of this Brief." (R.App. p. 99.)

At no time has Rohnert Park explained what additional facts it could plead to overcome the inadequacy of its claim to standing.

The opinion of the Court of Appeals addressed the same pleaded facts and evidence concerning the Petitioner's alleged interest and injury that were considered by the District Court. The Court accepted as true all uncontroverted facts pleaded by Rohnert Park, but obviously refused to accept the legal conclusion of

Paragraph VIII(b) of the Complaint that these factual allegations, as further developed and explained by the evidence, demonstrated a threat of irreparable loss or damage to Petitioner. The Court of Appeals resolved all doubts in the pleadings in favor of the Petitioner. For example, it assumed that the value of real property owned by Petitioner might decrease if the Santa Rosa shopping center was developed, even though the complaint contains no such allegation. The Court did not advert to, much less rely upon, the uncontroverted evidence presented by the Santa Rosa Respondents demonstrating that the Hahn contract, considering both its burdens and its benefits, placed Hahn at a $6 million disadvantage in competing with Rohnert Park developers.

Petitioner's assertion that the Court of Appeals improperly ignored its allegations concerning threatened loss or damage and made impermissible findings of fact on the subject Petitioner's "injury" both ignores the record of the proceedings below and misconceives the issue. Standing is a question of law to be resolved by the court on the basis of the facts plead and presented by way of affidavit. *In re Western Liquid Asphalt Cases* (C.A. 9) 487 F.2d 191, 199 (1973), cert. denied 415 U.S. 919, 39 L.Ed.2d 474; *John Lenore & Co.* v. *Olympia Brewing Co.* (C.A. 9) 550 F.2d 495, 498 (1977). In opposing the motion for summary judgment, Petitioner could not simply rely on the legal conclusion that it was threatened with irreparable injury. *Franke* v. *Midwestern Okl. Development Authority* (W.D. Okl.) 428 F.Supp. 719, 723 (1976); *Boothe* v. *Hickel* (D.C. Nev.) 347 F.Supp. 1273 (1969); see *Warth* v. *Seldin*,

422 U.S. at 503-504. Rohnert Park was required to respond to the proof that its only proprietary interest in the Rohnert Park site was its ownership of a library site by producing evidence of specific facts showing a genuine issue for trial with respect to the claim that Petitioner faced a threat of an "injury in fact" to a substantive and cognizable interest. See, *First Nat. Bank* v. *Cities Service Co.* (1968) 391 U.S. 253, 270, 20 L.Ed.2d 569, 581; *Daily Press, Inc.* v. *United Press International* (C.A. 6) 412 F.2d 126 (1969); *Tilden Financial Corp.* v. *Palo Tire Serv., Inc.* (C.A. 3) 596 F.2d 604, 607-608 (1979). The affidavit of Roland L. Brust concerning assessments at the Rohnert Park site is plainly inadequate for this purpose. Petitioner conceded that only the landowners, and not the City of Rohnert Park, are liable for repayment of the bonds issued to fund the assessment district. (R.App. pp. 176-179.)

A court of appeals may affirm the judgment of a district court on any ground that finds support in the record. *Jaffke* v. *Dunham* (1957) 352 U.S. 280, 281, 1 L.Ed.2d 314, 315. The cases cited by Petitioner do not support a contrary rule. *Singleton* v. *Wulff* (1976) 428 U.S. 106, 49 L.Ed.2d 826; *Hormel* v. *Helvering* (1941) 312 U.S. 552, 85 L.Ed. 1037; *British Airways Bd.* v. *Port Authority of New York* (C.A. 2) 558 F.2d 75 (1977); *Denton* v. *Mr. Swiss of Missouri, Inc.* (C.A. 8) 564 F.2d 236 (1977); and *Heirs of Fruge* v. *Blood Services* (C.A. 5) 506 F.2d 841 (1975), which are cited by Petitioner, stand only for the proposition that a court of appeals may not, except in unusual circumstances, affirm a summary judgment on a ground on which the losing party had no opportunity to argue and present evidence before the district court. *California Diversified Promotions, Inc.* v. *Musick* (C.A. 9) 505 F.2d 278 (1974) only requires a similar opportunity to be heard in response to a *sua sponte* dismissal by a trial court. Each of the foregoing decisions recognizes the rule that a court of appeals may affirm the granting of summary judgment on any ground supported by the record if the parties had opportunity to argue the relevant issue in their briefs and present evidence on it, even though such ground was not a basis for the decision of the district court. *Helena Rubinstein, Inc.* v. *Bau* (C.A. 9) 433 F.2d 1021 (1970); *United States* v. *General Motors Corporation* (C.A. D.C.) 518 F.2d 420, 441 (1975); *Paskaly* v. *Seale* (C.A. 9) 506 F.2d 1209, 1211, fn. 4 (1974).

The opportunity of Rohnert Park to justify its claim to standing is manifest by the briefs and affidavits submitted to the District Court. Where, as here, Petitioner has been afforded the opportunity to allege particularized facts and present evidence in support of its claim of standing to sue, but the Petitioner's standing still does not adequately appear from all materials in the record, the complaint must be dismissed. *Warth* v. *Seldin*, 422 U.S. at 501-502. Such result follows, rather than departs from, the accepted and usual course of judicial proceedings.

II

The Decision of the Court of Appeals Follows and Appropriately Applies the Minimum Requirements for Standing of Article III and the Accepted Principles for Determining Standing Under Section 16 of the Clayton Act. Neither the Decision of the Third Circuit Referred to by Petitioner nor the Decisions of This

Court Conflict With the Decision Below nor Have any Such Decisions Found Standing in Factual Circumstances Where the Alleged Injury of the Plaintiff was as Remote and Speculative as the Injury Alleged by Rohnert Park or the Consequences of Judicial Intervention as Conjectural and Hypothetical.

Relying on *Warth* v. *Seldin*, supra, and *O'Shea* v. *Littleton* (1974) 414 U.S. 488, 38 L.Ed.2d 674, the Court of Appeals concluded that Rohnert Park did not satisfy the causal relationship requirement for standing of Article III because it did not appear from the pleadings and evidence that the prospective adverse effect upon Rohnert Park was likely to be reduced by a favorable decision. Petitioner does not quarrel with this constitutional principle of standing that the Court of Appeals stated and applied. It merely objects to the Court's conclusion and contends that the Court overlooked or gave insufficient weight to allegations of the complaint. These objections turn upon the analysis of the particular facts concerning the project financing presented to the trial court and the construction and interpretation of the Hahn contract and other documents. Certiorari should not be granted for such a review of evidence and discussion of specific facts. *United States* v. *Johnston* (1925) 268 U.S. 220, 227, 69 L.Ed. 925, 926.

The opinion of the Court of Appeals summarizes some of the reasons why it is mere speculation to suggest that the judicial remedy of voiding or enjoining the conveyance of land to Hahn at the $2 million contract price will lead to the construction of the shopping center in Rohnert Park, the only result that will

alleviate the adverse effect complained of by Petitioner. The undeniable validity of this conclusion by the Court is manifest from the evidence relating to the first item on its list of hypothetical events that must occur before Rohnert Park would derive any benefit from the judicial remedy, namely, "that Hahn and the Agency would be unable to renegotiate a sale of the property. . . ." (App. p. 239.) According to the affidavit of Petitioner's appraiser, Mr. Stahr, the average value per square foot of the Santa Rosa site, based on small parcel sales, was $5 per square foot or approximately $4,356,000 for the land within the federally funded portion of the project, the portion of the sale approved by HUD. (App. pp. 170-171.) This sum is $2,356,000 more than Hahn was to pay for the land under the Hahn contract. But that Hahn contract also provides that Hahn is to pay, in addition to his land purchase price, more than $7.5 million for public parking facilities and other purposes. (R.App. pp. 23-28.) The Agency and Hahn could easily arrive at new contract

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[3] This example illustrates the fundamental misconception of the public financing of urban renewal inherent in Plaintiff's theory that a low land sale price subsidizes a competitive advantage for the urban renewal project developer. Under the loan and grant contract, HUD loans funds for redevelopment to the local agency and later confers a grant to the project by forgiving repayment of three-fourths of the *net* project costs *after deduction of the proceeds from property sales*. A higher land sale price decreases the net project cost thereby shifting public costs from HUD to the local government. This financing method, which is explained in a brief submitted to the District Court (R.App. pp. 162-164), limits the federal financial assistance to the amount of the loan. The Petitioner's repeated assertion that the Santa Rosa project has received $28 million in federal funds double counts by adding the $16 million loan and the $12 million grant. Moreover, this amount constitutes the assistance for the entire project, not merely the public costs related to the Hahn development. As the Affidavit of Mr. Burns indicates, less than $600,000 of this amount will be spent in the shopping center area, and this sum will be spent for streets and other improvements not related to the shopping center itself (R.App. pp. 3-4).

terms by increasing the land sale price to meet Petitioner's estimate for the fair value of the land and decreasing Hahn's consideration paid for other purposes by a corresponding amount.[3]

Here, unlike the situation presented in *Duke Power Co.* v. *Carolina Env. Study Gp.* (1978) 438 U.S. 59, 57 L.Ed.2d 595, there is no substantial probability that the proposed construction will be halted by the relief the Court can afford. Unlike the plaintiff in *Arlington Heights* v. *Metro. Housing Corp.* (1977) 429 U.S. 252, 261-262, 50 L.Ed.2d 450, 462, Rohnert Park cannot claim that the judicial relief it seeks will lead directly to the construction of a specific facility that Petitioner itself proposes to develop and for which it has expended funds for architectural plans and studies. The shopping center that must be built in Rohnert Park if Petitioner is to benefit appears from the facts before the lower court to be nothing more tangible than the glimmer in the mind's eye of unspecified third party developers. Like the alleged tax rate effect on the City of Rochester taxpayers denied standing in *Warth* v. *Seldin*, supra, the putative economic impact of the Santa Rosa project upon Rohnert Park depends upon the decisions of third parties, the potential Rohnert Park site developers who are not parties to the case.

In the circumstances of this case, the necessary causal relationship between alleged illegal action and injury is lacking not only because a judicial remedy would be ineffective, but also because the adverse effect upon Rohnert Park is not the result of the asserted illegality. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 50 L.Ed.2d 701. Presumably,

the outcome of competition between Hahn and potential Rohnert Park developers will hinge upon their respective economic advantage or disadvantage. The advantage or disadvantage of Hahn is a function of Hahn's total costs, not simply the land sale price. The land price is only a single, variable component of Hahn's total consideration. The land price can be adjusted to match Petitioner's assessment of fair value, and thereby obviate the alleged illegality, without changing the total costs of Hahn. The Court of Appeals recognized that the land price was not the cause of the Petitioner's alleged injury by its statement: ". . .[A]ny competition, whether or not it violates the antitrust laws, might have a similar adverse effect on the City's commercial development." (App. p. 230.) Although the issue addressed in *Brunswick*, supra, was whether the plaintiff had been injured "by reason of" an antitrust violation within the meaning of section 4 of the Sherman Act, the Court's analysis in that case is equally appropriate here and confirms the correctness of the Court's conclusion that the relationship between the allegedly illegal land sale price and the Petitioner's claimed injury is insufficient to satisfy the minimum causal relationship requirement for standing of Article III.

Petitioner's assertion that the decision of the Court of Appeals conflicts with *Mid-West Paper Products Co.* v. *Continental Group* (C.A. 3) 596 F.2d 573 (1979) cannot withstand scrutiny. In *Mid-West Paper Products Co.*, the Third Circuit found that indirect purchasers of paper bags had standing under section 16 of the Clayton Act to sue paper bag manufacturers engaged

in a price fixing arrangement. The Court noted the clear cause and effect relationship between the defendant's violation and the plaintiff's injury with the following comment:

> "...indirect purchasers can state unequivocally that under all circumstances prevalent in the real economic world,[81] money is passing from their hands into the pockets of the price fixers as a result of the conspiracy, and that no rational pricing decisions by any intermediary will erase this fact.[82]" (Footnotes omitted.) (*Mid-West Paper Products Co.* v. *Continental Group*, supra at p. 593.)

In its footnotes to the quoted passage, the Third Circuit emphasized the difference between the inevitable, unalterable loss of the indirect bag purchasers and the circumstances of plaintiffs denied standing in other cases because their alleged injury, like that of Rohnert Park, depended upon intermediary decisions of third parties.

Both the Third Circuit in *Mid-West Paper Products Co.*, supra at p. 591-592, and the Court in this case (App. p. 228) applied the liberal rule for section 16 standing of *Tugboat, Inc.* v. *Mobile Towing Co.* (C.A. 5) 534 F.2d 1172 (1976); that entitlement to injunctive relief against an antitrust violation under section 16 is limited only by general rules of standing; a plaintiff need show only that he is threatened by injury proximately caused by the defendant. Measured by general rules of standing, there was no question that enjoining the manufacturer's price fixing arrangement in *Mid-West Paper Products Co.*, supra, would benefit the indirect purchasers of paper bags. The contrary conclu-

sion as to Rohnert Park is founded upon fundamental differences in factual circumstances. Here, for the reason already discussed, there is no indication that the purported adverse effect on Petitioner of a shopping center not being developed in Rohnert Park would be avoided by the exercise of the Court's judicial powers. *Duke Power Co.* v. *Carolina Env. Study Gp.*, 438 U.S. at 74-75.

The Court of Appeals found that besides failing to allege a sufficient causal relationship between the claimed injury and the challenged land price approvals, Rohnert Park had also failed to assert or identify a cognizable interest sufficient to assert standing to sue. Although the Court discussed the "speculative" nature of Petitioner's interest only with reference to section 16 of the Clayton Act, the inadequacy of the Petitioner's claim in this respect is constitutional in dimension. The showing of a distinct and palpable injury to a specific, identifiable interest is an essential prerequisite of a "case or controversy" sufficient to justify invocation of federal court jurisdiction. *Warth* v. *Seldin*, 422 U.S. at 498-501; *Duke Power Co.* v. *Carolina Env. Study Gp.*, 438 U.S. at 72. Because the alleged impact of the Santa Rosa shopping center upon Rohnert Park is both indirect (rather than direct) and threatened or prospective (rather than actual), Rohnert Park was required to show specific, concrete facts demonstrating the "immediacy and reality" of its claim of injury. *Simon* v. *Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 44-45, 48 L.Ed.2d 450, 463-464; *O'Shea* v. *Littleton*, supra. Absent allegations or evidence of a demonstrable, particularized injury,

there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger* v. *Reservists to Stop the War* (1974) 418 U.S. 208, 221-222, 41 L.Ed.2d 706, 718-719; *Warth* v. *Seldin*, 422 U.S. at 508.

The alleged proprietary interest of Rohnert Park does not satisfy these criteria. Rohnert Park is a municipal corporation. It is not a developer. It is not a retail merchant. Rohnert Park owns a donated library site within the area proposed for regional commercial development and a wastewater treatment facility site in another area zoned commercial, but it has not alleged or demonstrated any facts to show that the value or any other aspect of its interest in these properties would be adversely affected by the development of the Santa Rosa project. Rohnert Park alleges that it has formed an assessment district on behalf of property owners at its proposed regional shopping center site, but concedes that only the property owners, and not the City itself, are liable for the public improvement assessments of the district. (R.App. p. 177.) Rohnert Park does not assert that the streets, sewers and other public improvements of the district will become worthless, or even be affected in value, if the shopping center is developed in Santa Rosa.

Petitioner, unlike the plaintiffs in *City of Davis* v. *Coleman* (C.A. 9) 521 F.2d 661 (1975), has not asserted a cognizable, non-economic, municipal interest, and the facts presented to the lower courts establish that Petitioner cannot do so. The complaint alleges that the

purpose of Petitioner's adoption of a general plan which designates the Rohnert Park site "for development of commercial facilities including a regional shopping center" was "to further its own proprietary interests; and to increase its sales tax revenues; and to further the interests of its inhabitants, property owners and taxpayers." (App. p. 4.) Thus, Petitioner's own pleadings admit that the general plan interest of Rohnert Park is in reality a proprietary and economic interest rather than a municipal interest.

Rohnert Park cannot claim that the Santa Rosa project infringes upon its local planning interests. The statutory justification for general plans in California is to enable local government to control the use of private property and thereby insure that private development is compatible with the interests of the community as a whole. See *O'Loane* v. *O'Rourke* (1965) 231 Cal.App.2d 774, 42 Cal.Rptr. 283. The function of the general plan is regulatory, not entrepreneurial. Rohnert Park does not allege the Respondents' actions deprive it of the ability to control or regulate private developers who may seek to develop the land at the Rohnert Park site. Santa Rosa has not imposed any zoning or other regulatory control upon the Rohnert Park site.

Furthermore, Rohnert Park cannot assume the role of a champion of regional planning interests in this litigation. As a California general law city "organized pursuant to Part 1 of Division 2 of the Government Code" (App. p. 2), the powers and purposes of Rohnert Park are limited to those expressly conferred by the Legislature, together with the powers necessarily in-

cident to those expressly granted or essential to the declared object and purposes of the City. *Irwin* v. *City of Manhattan Beach* (1966) 65 Cal.2d 13, 51 Cal.Rptr. 881, 415 P.2d 769. With respect to developments of regional significance, the California Legislature, by its District Planning Law (Government Code section 66100-66390), has mandated the preparation of regional plans to adapt and harmonize the interests of local municipalities and coordinate the physical development of the area of the district in a manner designed to promote the general welfare and prosperity of its people. (Government Code section 66241.) The record in this case shows that Petitioner is proceeding directly contrary to regional plan objectives by promoting the development of a regional shopping center at the suburban Rohnert Park site rather than in downtown Santa Rosa, the local urban center. (R.App. pp. 116-118.) Rohnert Park, like the taxpayer petitioners found to lack standing in *Warth* v. *Seldin*, 422 U.S. at 509, has not and cannot assert any right under the Constitution or any statute to be free of indirect or incidental economic impacts that may result from the governmental activities of a neighboring municipality, Santa Rosa.

Rohnert Park's effort to claim standing as the representative of developers, taxpayers and property owners founders upon the prudential limitations of standing. Rohnert Park alleges no concrete and particularized injury to itself or those it claims to represent. *Warth* v. *Seldin*, 422 U.S. at 509-513; *Buckley Towers Condominium, Inc.* v. *Buchwald* (C.A. 5) 533 F.2d 934 (1976). Nothing in the record indicates that

the Rohnert Park site cannot be developed for some use other than a regional shopping center or that such alternative development would be less profitable and beneficial than a shopping center to the landowners of the site and the citizens of Rohnert Park.

Rohnert Park's claim to representational standing is further discredited because the persons it purports to represent are plainly capable of asserting their own rights. See *Warth* v. *Seldin*, 422 U.S. at 510. Indeed, Codding Enterprises, the principal developer and taxpayer that Rohnert Park claims to represent has not only litigated the same Housing Act and antitrust violation issues in the state court validating proceeding, but has also financed Rohnert Park's own lawsuit and more than a dozen others.

As to the citizens and taxpayers that Petitioner purports to represent (as distinguished from the property owners of the proposed commercial site), the asserted impact of the Santa Rosa project is only a general, abstract, and indirect economic effect, an injury shared in substantially equal measure by all citizens, government entities, and taxpayers within Petitioner's defined relevant market area but outside of the City of Santa Rosa. Such a generalized grievance cannot justify judicial intervention. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. at 221-227; *Warth* v. *Seldin*, 422 U.S. at 499. Assuming *arguendo* that some acts of the Respondents can be characterized as violations of the antitrust or of the housing and redevelopment laws, nothing in the record distinguishes Rohnert Park in any meaningful way from every other city that happens to be the home of a person or firm injured by a

violation of these laws. To confer standing to sue upon a city in this circumstance removes all limitations on standing for a municipal corporation and grants to a city a right to intervene in almost every conceivable grievance of its citizens and taxpayers.

III

Certiorari Should be Denied Because the Decision of the Court of Appeals can be Sustained on Numerous Alternative Grounds, Including the Grounds on Which the Case was Decided by the District Court and the Grounds Set Forth in the First Opinion of the Court of Appeals.

In reviewing the decision of a court of appeals, all grounds for affirming the decision may be considered, including contentions not passed upon or even rejected by the lower court. *Langnes* v. *Green* (1931) 282 U.S. 531, 535-539, 75 L.Ed. 520, 523-525. The Court of Appeals decision in this case is supported not only by the grounds set forth in the decision itself, but also by the reasons explained in the withdrawn opinion of the Court of Appeals decision, the grounds of the District Court decision, and the several other justifications for dismissal advanced by the Respondents before the lower courts.

The first opinion of the Court of Appeals (App. pp. 198-201) concluded that Rohnert Park was barred from relitigating the issue of whether the land sale price of the Hahn contract was less than fair value by the collateral estoppel effect of the judgment in the Santa Rosa Respondents' favor in the state court validating proceeding. The Court's final opinion noted

this ground but declined to rest its decision upon it. (App. p. 234.)

As in *Montana* v. *United States* (1979) ___ U.S. ___, 59 L.Ed.2d 210, the same party that brought the state court validating proceeding has also financed and by that means controlled this lawsuit. The affidavits submitted in support of the motion for summary judgment established that the evidence on the issue of fair value submitted by the Petitioner in this case was identical to the evidence presented to the state court.[4] (R.App. pp. 126-140.) Petitioner does not suggest that the state court proceedings were unfair, that the law has changed, or that any relevant facts are different for the resolution of the same antitrust and housing law issues in this case.

The state court suit by Codding Enterprises was an *in rem* proceeding. The state statutes, Health and Safety Code section 33503 and Code of Civil Procedure sections 869 and 870 (R.App. pp. 209, 211-212), provide that all persons are bound by adjudications made in such a validating proceeding. No relief could be granted to Petitioner in this case except relief that would interfere with and collaterally attack the judgment of the state court. For that reason, the justification for requiring Rohnert Park to accept the prior adjudication is even stronger than the rationale for

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[4] Footnote 2 of the Petition suggests that certain sale and leaseback financing documents set forth in the Appendix tc the Petition are evidence of a land value "almost five (5) times what HUD thought was 'fair value' (App. p. 374)." The referenced document clearly shows that the almost five times greater value is a value established for financing purposes of a fully constructed shopping center leased to major department stores for a period of thirty (30) years. The subject of this case is the bare land value, not the completed shopping center value.

holding the plaintiff to be bound by the results of earlier litigation in *Montana* v. *United States*, supra.

The District Court opinion concluded that Petitioner had failed to state a claim for relief under the antitrust laws and that Petitioner's claim was barred by *Parker* v. *Brown*, supra. The inadequacy of Petitioner's "excess capacity" antitrust theory is best explained by the opinion itself. (App. pp. 185-187.) The acceptance of Petitioner's theory of excess capacity and novel limitation of the relevant market to "new" retail space would have the bizarre result of erecting an anti-competitive barrier that would bar new market entrants, such as Hahn, from entering any industry or line of commerce suffering from overcapacity. It would protect the large and established firm against the small expanding firm and the new entrepreneur.

The District Court's reliance on *Parker* v. *Brown*, supra, tacitly implies both that the governmental action of the Respondents was lawful and valid and that the contested acts of the non-federal Respondents are exempt from antitrust liability under *Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389, 55 L.Ed.2d 364. Both of these conclusions are supported by uncontroverted evidence.

While Petitioner disputes the value of the land sold to Hahn, it cannot refute that all appraisal evidence presented to HUD and the Agency supported the Respondents' judgment that the price to Hahn at least equaled the fair value of the property. The highest land value price suggested by the evidence before the Agency was that of Mr. Lane's 1975 appraisal which indicated a total value of $1,829,520 for the land

within the federally financed area of the project. The contract required that Hahn pay $2 million. (R.App. p. 68.)

The federal and state statutes vest in HUD and the Agency the authority to determine whether a sale price is not less than the statutory minimum price. Where, as here, the Petitioner has elected to withhold its appraisal evidence at the hearings of the appropriate administrative bodies, it cannot contest the agencies' approvals simply by offering a new appraiser's opinion that the property was worth more. The approvals of the sale price must be sustained if substantial evidence in the administrative records supports the conclusion that the $2 million price is not less than the fair value of the land. See *Berman* v. *Parker* (1954) 348 U.S. 26, 35-36, 99 L.Ed. 27, 39; *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 37-41, 37 Cal. Rptr. 74, 85-87, 389 P.2d 538, 549-551. To challenge these approvals, the Petitioner must show that the evidence considered by HUD and the Agency was so false or fraudulent that it cannot be deemed "substantial evidence."

The appraisal of R. Dean Stahr, the only evidence on the issue of fair value presented by Petitioner to the lower court, does not raise a genuine material issue of fact when considered in accordance with the substantial evidence standard. Nothing in the Stahr appraisal indicated that the data or methodology of the Lane appraisal and the other evidence presented to HUD and the Agency were false or fraudulent. Stahr, at most, simply offers another opinion.

The appraisal of Mr. Stahr concluded that the land

at the Santa Rosa shopping center site, if marketed in small parcels, could be sold for $5 per square foot. (App. pp. 170-171.) This price compared with the $2 per square foot estimated by Lane as the fair value for a sale of the entire site. (R.App. pp. 21, 30, 37.) However, the appraisal of Lane also noted that if the land were sold in parcels, as suggested by Stahr, more than half of the site would be required to be devoted to public parking, with the result that only half as many acres would be sold (R.App. pp. 33-34.) Lane also observed that the anti-speculation and other restrictive regulations of the redevelopment plan — which provide that land cannot be sold except to a buyer who agrees to prompt development of a specific project — would make any parcel sale program a difficult and protracted venture that would force the Agency to incur substantial carrying costs for interest and lost taxes. (R.App. p. 31.) In summary, after making appropriate adjustments for the square footage of the site that could be sold as parcels and all costs of such sales, the Stahr appraisal is not even inconsistent with the fair value determinations of the Respondents much less a challenge to the integrity of the evidence Respondents considered when approving the Hahn contract.

In addition to being irrefutably lawful under state and federal housing and redevelopment laws when evaluated by the "substantial evidence" standard, the Agency approval of the Hahn contract is clearly state mandated local government action outside the purview of the antitrust law under the rationale of *Lafayette* v. *Louisiana Power & Light Co.*, supra. By its

Community Redevelopment Law (Health and Safety Code section 33000 et seq.), the California State Legislature has created a redevelopment agency in each local community. (Health and Safety Code section 33100.) The agency is directed by state law to identify blighted areas. In discharging this legislative delegation of authority, a redevelopment agency acts as an agent of state government. *Fellom* v. *Redevelopment Agency* (1958) 157 Cal.App.2d 243, 320 P.2d 884. (R.App. pp. 181-185.) The state controls local redevelopment both by explicit statutory limitations (Health and Safety Code sections 33030-33032) and procedures and by authorizing any public entity or individual to bring a validating proceeding to test the validity of any blight determination by a redevelopment agency. (R.App. p. 208.)

The state legislature has mandated that when an area has been validly found to be blighted the appropriate redevelopment agency shall intervene in private land use and the real estate market to eliminate inadequate public utilities, deteriorating physical structures, and the other characteristics of blight (Health and Safety Code section 33037). The finding of blight is tantamount to a determination that the private competitive market has not worked. Even if such agency action is characterized as anti-competitive, it is nonetheless action pursuant to a state policy that is intended to displace competition with regulation. The District Court properly deduced that the Sherman Act cannot be applied to defeat the legitimate governmental purposes of urban renewal.

Neither the District Court nor the Court of Appeals

found need to decide whether the evidence presented a genuine triable issue as to Petitioner's contention that the Hahn contract imposed an unfair competitive disadvantage on Rohnert Park developers. In the last analysis, Petitioner's assertion that the sale of land to Hahn is a subsidy that confers an unfair competitive advantage upon Hahn in violation of Sherman Act sections 1 and 2 must rise or fall on the evidence of whether Hahn will have any competitive advantage at all. The sole evidence in the record as to Hahn's advantage or disadvantage with respect to potential Rohnert Park developers, considering Hahn's total contract consideration and costs, is the testimony of Mr. Ernest W. Hahn, president of Hahn, at the hearings of the Agency. According to Mr. Hahn, Hahn faces a competitive disadvantage against suburban developers of $6 million (R.App. p. 14) or $5.6 million (R.App. p. 17). Petitioner has offered no rejoinder.

CONCLUSION

The Petitioner had ample notice and opportunity to be heard in the lower courts on the issues which it requests this Court hear. The decision of the Court of Appeals is consistent with the decisions of this Court, the court below, and the other federal courts. The decision must also be affirmed on several alternative grounds. For these reasons, the Santa Rosa Respondents respectfully submit that the petition for writ of certiorari should be denied.

Dated, Sacramento, California
February 21, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Brief in Opposition to the Petition for Writ of Certiorari and separate Appendix were mailed postage prepaid to the counsel of record of Petitioner and other Respondents as stated below:

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I further certify that all parties required to be served have been served.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

v.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Reply by Petitioner to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Misstatements, Irrelevant Matter and Improper Citation to Cases Appearing in Brief in Opposition	3
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

	Pages
Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, 50 L.Ed.2d 450	5
Armond Schmoll Inc. v. Federal Reserve Bank (1941) 37 N.E.2nd 225, 286 N.Y. 503, cert. den. 315 U.S. 818, 87 L.Ed. 1215	6
City of Rohnert Park v. Patricia Roberts Harris, etc., et al. (C.A. 9) 601 F.2d 1040 (1979)	2
Codding Enterprises, et al. v. Urban Renewal Agency of Santa Rosa, et al., Nos. 79465, 79762, 81799, 84237, Superior Court of Sonoma County	3 (Fn2)
Duskin v. San Francisco Redevelopment Agency (1973) 31 C.A.3d 769	6
Helena Rubenstein, Inc. v. Bau (C.A. 9) 433 F.2d 1021 (1970)	7
Hunt v. Washington Apple Advertising Commission (1977) 432 U.S. 333, 53 L.Ed.2d 383	4 (Fn3)
Jaffke v. Dunham (1957) 352 U.S. 280, 1 L.Ed.2d 314	4
Langnes v. Green (1931) 282 U.S. 531, 75 L.Ed. 520	5, 6
Paskaly v. Seale (C.A. 9) 506 F.2d 1209 (1974)	7
United States v. General Motors Corporation (C.A. D.C.) 518 F.2d 420 (1975)	7
Zenith Radio Corp. v. Hazeltine Research, Inc. (1969) 395 U.S. 100, 23 L.Ed.2d 129	4 (Fn3)

Statutes

	Pages
Administrative Procedure Act:	
5 U.S.C. 551 et seq.	4
5 U.S.C. 702	2
5 U.S.C. 706	2
Clayton Act:	
15 U.S.C. 15, Section 4	4
15 U.S.C. 15, Section 7	4
15 U.S.C. 26, Section 16	2, 4
National Environmental Policy Act (NEPA):	
42 U.S.C. 4321, et seq.	4
National Housing Act:	
42 U.S.C. 1460(c)(4)	2

Rules of Court

Rules of the Supreme Court of the United States:	
Rule 40(h)(5)	7
Federal Rules of Civil Procedure:	
Rule 56	2
Rule 56(e)	5, 7
Federal Rules of Evidence:	
Section 201	3 (Fn2)

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

v.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Reply by Petitioner to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner herein, CITY OF ROHNERT PARK, respectfully submits its Reply to the Brief In Opposition filed *only* by Respondents City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa (hereinafter the Santa Rosa Respondents). Petitioner respectfully prays that this Court issue a writ of certiorari to review the Opinion and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 24, 1979 (App. p. 220), and corrected by Order of October 26, 1979 (App. pp. 307-8). As noted in its Petition For Writ of Certiorari by City of Rohnert Park filed on January 4, 1980, the Opinion below was reported at 601 F.2d 1040, and the pertinent statutes appear in a separate Appendix filed by Petitioner (App. pp. 341-346). The Santa Rosa Respondents agree on at least two of the questions presented. Briefly summarized, the two questions the Santa Rosa Respondents agree on are whether Petitioner has standing to seek relief under Section 16, Clayton Act (15 U.S.C. 26) and relief under the Administrative Procedure Act (5 U.S.C. 702, 706) for a violation by Respondents of a relevant statute 42 U.S.C. 1460(c)(4). Neither question was either decided or discussed by the District Court in its Order Granting Summary Judgment (App. pp. 183-188).

In their thirty-six page Brief in Opposition, the Santa Rosa Respondents have reaffirmed Petitioner's contention that there are indeed many genuine issues as to material facts. See Rule 56, Federal Rules of Civil Procedure. They have done so by a combination of misstatements of the record, the use of irrelevant matter and citation of cases for propositions not supported by those cases. Petitioner has selectively chosen some of the more significant of these, and it will briefly discuss them below.

MISSTATEMENTS, IRRELEVANT MATTER AND IMPROPER CITATION TO CASES APPEARING IN BRIEF IN OPPOSITION[1]

Pages 2-3. The contention that a regional shopping center in Rohnert Park would violate the objectives of the regional plan of the Association of Bay Area Governments is not supported by the Appendix reference (R. App. p. 113) Moreover, this contention, *inter alia,* was unsuccessfully advanced in state court by the Santa Rosa Respondents. See Fn. 5 at page 10 of Petition For Writ of Certiorari.

Page 3. As a major owner of property in Rohnert Park, Codding Enterprises had a legitimate economic interest to protect there. Accordingly, it did advance funds to help Petitioner defray some of its costs and attorneys' fees. In no way did it "control" this case, and the Santa Rosa Respondents have not offered any facts showing in what way, if any, "control" occurred. What the Santa Rosa Respondents omitted was the finding of fact in the Sonoma County Superior Court validating proceeding mentioned on page 7 that Respondent Ernest W. Hahn, Inc. (Hahn) had advanced $650,000 to the Urban Renewal Agency, one of the two Santa Rosa Respondents. "A portion of the Agency's administrative costs * * *, including the salary of Agency Executive Director James K. Burns, were paid from the $650,000 made available by Hahn.[2] The advance of funds by Respondent Hahn and the use of part of it as found by

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1 Page references are to the Brief In Opposition. References to the Appendices are to Respondents' (R. App. p. ....) and to Petitioner's (App. p. ....).

2 Petitioner requests this Court to take judicial notice of Finding of Fact No. 19, as quoted in part, in *Codding Enterprises et al. v. Urban Renewal Agency of Santa Rosa, et al.*, Nos. 79465, 79762, 81799 and 84237 in Sonoma County Superior Court; Section 201, Federal Rules of Evidence.

the state court is at least one way of obtaining favorable recommendations from the Executive Director.

Page 8. It is not accurate to say that each of the Respondents argued before the District Court that the Petitioner lacked standing to sue under Section 16, Clayton Act (15 U.S.C. 26). Respondent Hahn argued lack of standing under Section 4, Clayton Act (15 U.S.C. 15) which is not involved in this proceeding (App. pp. 90-93). Respondent HUD argued only on the issue of standing under the Administrative Procedure Act (APA) and the National Environmental Policy Act—NEPA (App. pp. 107-112). The latter is not involved here, and the District Court never even mentioned the APA. The Santa Rosa Respondents also argued standing under Section 7, Clayton Act (15 U.S.C. 15) which is not involved herein (App. pp. 159-160). They did mention Section 16 standing (R. App. pp. 170-172) but essentially dealt with *parens patriae,* a status petitioner has never claimed. Here, however, Petitioner has alleged "threatened loss or damage by a violation of the antitrust laws" (App. pp. 2, 7 and 8), pleading ultimate facts, not the evidence.[3]

Page 18. The Santa Rosa Respondents argue that: "A court of appeals may affirm the judgment of a district court on any ground that finds support in the record", citing *Jaffke v. Dunham* (1957) 352 U.S. 280, 281, 1 L.Ed.2d 314, 315. What this Court actually said there was that: "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." This Court, in *Jaffke,* supra, held only that if the District Court was in error in striking an admissible affidavit, a cross-appeal was

3. For "representational standing" arising out of economic loss, see *Hunt v. Washington Apple Advertising Commission* (1977) 432 U.S. 333, 53 L.Ed.2d 383. However, Petitioner need not show actual loss, only the threat thereof. *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 23 L.Ed.2d 129.

not necessary for the Court of Appeals to rule on the question of its admissibility. This was a legal issue, not an impermissible finding of fact on appeal. Moreover, in the instant case, the Court of Appeals did not affirm the judgment of the District Court. It remanded for dismissal for lack of standing (App. p. 240).

Page 22. The Santa Rosa Respondents claim that the judicial relief sought "* * * will (not) lead directly to the construction of a specific facility * * *" there, citing *Arlington Heights v. Metro Housing Corp.* (1977) 429 U.S. 252, 261-62, 50 L.Ed.2d 450, 462. That case requires no such showing. Injunctive relief, if granted, does not have to guarantee that a regional shopping center would be constructed in Rohnert Park, because it, like the housing in *Arlington Heights,* supra, "* * * (is) subject to some extent to similar uncertainties. When a project is as detailed and specific as Lincoln Green, a court is not required to engage in undue speculation as a predicate for finding the plaintiff has the requisite personal stake in the controversy."

The regional shopping center in Rohnert Park, a specific project, provides that "essential dimension of specificity" that informs judicial decision making. Petitioner has alleged in its Complaint "* * * a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand * * *." (App. p. 5) No admissible evidence has been offered by Respondents to "pierce" these allegations. See Rule 56(e), Federal Rules of Civil Procedure.

Page 30. The Santa Rosa Respondents have cited *Langnes v. Green* (1931) 282 U.S. 531, 535-539, 75 L.Ed. 520, 523-525 for the proposition that: "In reviewing the decision of a court of appeals, all grounds for affirming the

decision may be considered, including contentions not passed upon or even rejected by the lower court." What the Santa Rosa Respondents omitted to say was that *Langnes,* supra, was before this Court on writ of certiorari to the Ninth Circuit in an admiralty case. On appeal in admiralty, there is a trial de novo on appeal. No such rule applies in this proceeding.

Page 30. In the heading on page 30 (III), the Santa Rosa Respondents argue that the decision of the Court of Appeals can be sustained, *inter alia,* on the grounds set forth in its *first* opinion (App. pp. 192-201). What these Respondents omitted to say was that the *first* opinion "* * * has been withdrawn." (App. p. 224) A fair reading of the *second* opinion (App. pp. 220-240) leads irresistibly to the conclusion that the ground of decision (collateral estoppel by judgment of a state court) which the Santa Rosa Respondents argue once again, was abandoned by the Court of Appeals in its *second* opinion. Petitioner respectfully submits that the Court of Appeals did so for the reasons set forth in its Petition For Rehearing (App. pp. 206, 207-213). See *Armond Schmoll, Inc. v. Federal Reserve Bank* (1941) 37 N.E.2d 225, 286 N.Y. 503, cert. den. 315 U.S. 818, 87 L.Ed. 1215, cited by Petitioner therein (App. p. 212).

Page 34. The claim by the Santa Rosa Respondents that "* * * the Agency approval of the Hahn contract is clearly mandated local government action * * *" demonstrates a genuine issue as to a material fact. An unlawful act—sale of urban renewal land at less than "fair value"—cannot be "clearly mandated local government action." See *Duskin v. San Francisco Redevelopment Agency* (1973) 31 C.A.3d 769.

Page 36. The Santa Rosa Respondents argue that Respondent Hahn "* * * faces a competitive disadvantage

against suburban developers of $6 million (R. App. p. 14), stating that Petitioner has offered no rejoinder. None is necessary, since no one has suggested that Respondent Hahn build a regional shopping center in Rohnert Park. It chose to build in Santa Rosa, because it could acquire approximately 30 acres of land there for $2,000,000. The "fair value" of 20 acres, the federally financed portion of the total, raises a genuine issue as to a material fact, since Respondents presented *no admissible* evidence on this issue. See Rule 56(e), Federal Rules of Civil Procedure. The Santa Rosa Respondents have offered no rejoinder to this contention anywhere in the record.

For all the foregoing reasons, Petitioner respectfully submits that Heading III and the argument therein should be disregarded as irrelevant and immaterial. Rule 40(h)(5), Rules of Supreme Court of the United States.

Finally, Petitioner respectfully submits that it has been denied due process of law for all the reasons set forth at pages 13 to 19 of its Petition For Writ of Certiorari. The three cases cited by the Santa Rosa Respondents at page 19—*Helena Rubenstein, Inc. v. Bau* (C.A. 9) 433 F.2d 1021 (1970); *United States v. General Motors Corporation* (C.A. D.C.) 518 F.2d 420 (1975); and *Paskaly v. Seale* (C.A. 9) 506 F.2d 1209 (1974)—are not to the contrary. All three involved the affirmance of summary judgment, not an order remanding for dismissal for lack of standing, an issue not even mentioned by the District Court.

CONCLUSION

For all the reasons set forth in its Petition and its Reply to Brief In Opposition, Petitioner respectfully submits that the Petition For Writ of Certiorari should be granted.

Dated: San Francisco, California

February 27, 1980

WILLIAM M. BRINTON
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Reply By Petitioner to Brief in Opposition to Petition for a Writ of Certiorari were mailed postage prepaid to the counsel of record of Respondents as stated below:

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